

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE EASTERN DISTRICT OF TEXAS
3 MARSHALL DIVISION

3 VERSATA SOFTWARE, INC.,) Civil Docket No.
4 ET AL) 2:07-CV-00153-CE
5) May 9, 2011
6 VS.) 8:30 A.M.
7)
8 SAP AMERICA, INC., ET AL)

7 TRANSCRIPT OF JURY TRIAL
8 BEFORE THE HONORABLE CHAD EVERINGHAM
9 UNITED STATES MAGISTRATE JUDGE

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P R O C E E D I N G S

LAW CLERK: All rise.

(Jury in.)

THE COURT: Please be seated.

Good morning, ladies and gentlemen. I hope you had a nice weekend. The process today is going to begin with some preliminary instructions that the Court is going to give, followed by the opening statements of the lawyers at which time it will probably be pretty near time to take our morning recess, but we may get a little bit of testimony in before we break. But that's the process for the morning session.

Members of the Jury, you have now been sworn as the Jury to try this case. As the Jury you will decide the disputed questions of fact.

As the Judge I will decide all questions of law and procedure. From time to time during the trial and at the end of the trial, I will instruct you on the rules of law that you must follow in making your decision.

First I'm going to talk about what a patent is and how one is obtained. This case involves a dispute relating to a United States patent. Before summarizing the positions of the parties and the legal issues involved in the dispute, let me take a moment to

1 explain what a patent is and how one is obtained.

2 The United States Constitution grants
3 Congress the powers to enact laws to promote the
4 progress of science and useful arts by securing for
5 limited times to authors and inventors the exclusive
6 rights to their respect writings and discoveries. With
7 this power, Congress enacted the patent laws.

8 Patents are granted by the United States
9 Patent and Trademark Office, sometimes called the PTO.
10 The process of obtaining a patent is called patent
11 prosecution. A valid United States patent gives the
12 patent owner the right for up to 20 years from the date
13 the patent application was filed to prevent others from
14 making, using, offering to sell, or selling the patented
15 invention within the United States or from importing it
16 into the United States without the patentholder's
17 permission.

18 A violation of the patent owner's rights
19 is called infringement. The patent owner may try to
20 enforce a patent against persons believed to be
21 infringers by a lawsuit filed in federal court.

22 Now, to obtain a patent, one must file an
23 application with the PTO. The PTO is an agency of the
24 federal government and employs trained examiners who
25 review applications for patents. The application

1 includes what is called a specification, which must
2 contain a written description of the claimed invention
3 telling what the invention is, how it works, how to make
4 it, and how to use it so others skilled in the field
5 will know how to make and use it.

6 The specification concludes with one or
7 more numbered sentences; these are called patent claims.
8 When the patent is -- is eventually granted by the PTO,
9 the claims define the boundaries of its protection and
10 give notice to the public of those boundaries.

11 After the applicant files a patent
12 application, a PTO examiner reviews the patent
13 application to determine whether the claims are
14 patentable and whether the specification adequately
15 describes the invention claimed. In examining a patent
16 application, the patent examiner reviews records
17 available to the PTO for what is referred to as prior
18 art. The examiner also will review prior art if it is
19 submitted to the PTO by the applicant.

20 In general, prior art includes things that
21 existed before the claimed invention that were publicly
22 known or used in a publicly accessible way in this
23 country or that were patented or described in a
24 publication in any country. The examiner considers,
25 among other things, whether each claim defines an

1 invention that is new, useful, and not obvious in view
2 of the prior art.

3 A patent lists the prior art that the
4 examiner considered. This list is called the cited
5 references. After the prior art search and examination
6 of the application, the patent examiner then informs the
7 applicant in writing what the examiner has found and
8 whether any claim is patentable and thus will be
9 allowed. This writing from the patent examiner is
10 called an office action.

11 If the examiner rejects the claims, the
12 applicant then responds and sometimes changes the claims
13 or submits new claims. This process which takes place
14 only between the examiner and the patent applicant may
15 go back and forth for some time until the examiner is
16 satisfied that the application and claims meet the
17 requirement for a patent. The papers generated during
18 this time of communicating back and forth between the
19 patent examiner and the applicant make up what is called
20 the prosecution history. All of this material becomes
21 available to the public no later than the date when the
22 patent issues.

23 Now, each of you will have a notebook
24 after the first break which contains the '350 patent and
25 the meaning of certain terms that are used in the '350

1 patent. I'm going to give you some additional
2 instructions before we start the second session this
3 morning about the patent that's actually at issue in
4 this case, but you'll have that for your use during the
5 course of the trial along with the Court's definitions
6 of certain terms that are in the patent.

7 But I want to give you an overview at this
8 time of the positions of the parties to this lawsuit.
9 And to help you follow the evidence, I'm going to give
10 you a summary of those positions.

11 The Plaintiffs in this case are Versata
12 Software, Incorporated, formerly known as Trilogy
13 Software, Incorporated, Versata Development Group,
14 formerly know as Trinity -- or excuse me, Trilogy
15 Development Group, Incorporated, and Versata Computer
16 Industry Solutions, Incorporated, formerly known as
17 Trilogy Computer Industry Solutions, Incorporated. I'll
18 refer to them collectively as either the Plaintiffs,
19 Versata or Trilogy.

20 The Defendants in this case are SAP
21 America, Incorporated, and SAP AG. I'll refer to them
22 collectively as either the Defendants or SAP.

23 This is a trial in part on patent damages
24 and the one patent being asserted in this case is United
25 States Patent No. 6553350. This patent may be referred

1 to as the '350 patent. This patent may also be referred
2 to as either the patent at issue or the patent-in-suit.

3 It's been previously determined that the
4 '350 patent is valid and is infringed by the Defendants.
5 Your job as the Jury will be to determine the amount of
6 damages owed to the Plaintiff.

7 The Plaintiffs also allege that since May
8 the 6th, 2010, SAP has continued to directly infringe
9 certain claims of the '350 patent in connection with its
10 making, using, selling, offering to sell, and importing
11 certain products.

12 The Plaintiffs further allege that SAP has
13 continued to induce and contribute to the infringement
14 of the '350 patent by others. SAP denies Versata's
15 claims. SAP asserts that the Plaintiffs are not
16 entitled to the amount of damages they seek and that
17 since May 6th, 2010, its products no longer infringe the
18 claims of the '350 patent.

19 Your job will be to decide whether the
20 Defendants directly infringe or have induced
21 infringement of the asserted claims of the '350 patent
22 since May the 6th, 2010. If you decide that the
23 Defendants have infringed or have induced infringement
24 of those claims, then you must determine any additional
25 money damages to be awarded to the Plaintiffs to

1 compensate them for the infringement.

2 Your job is also going to be to determine
3 the nature and amount of damages that the Plaintiffs are
4 entitled to as a result of the infringement that was
5 previously determined to have occurred.

6 So those are the types of facts that the
7 Jury in this case is going to be called upon to
8 determine.

9 Now, it's my job as Judge to determine the
10 meaning of any claim language that needs interpretation.
11 You must accept the meanings I give you and use them
12 when you decide whether any claim of the patent has been
13 infringed. And you'll be provided, as I indicated, a
14 copy of the meanings of the claim terms later this
15 morning when you get your Jury notebooks.

16 I'll give you a brief outline of the
17 trial. Soon the lawyers for the parties will make what
18 is called an opening statement. Opening statements are
19 intended to assist you in understanding the evidence.
20 What the lawyers say is not evidence.

21 After the opening statements, the parties
22 will present their evidence. After all the evidence is
23 presented, the lawyers will again address you to make
24 final arguments. Then I will instruct you on the
25 applicable law and you'll then retire to deliberate on a

1 verdict.

2 I'll now say a few words about your
3 conduct as Jurors. First, you are not to discuss this
4 case with anyone, including your fellow jurors, members
5 of your family, people involved in the trial or anyone
6 else, nor are you allowed to permit others to discuss
7 the case with you. If anyone approaches you and tries
8 to talk to you about the case, please let me know about
9 it immediately.

10 Let me say another word about the use of
11 cell phones to communicate with people during the course
12 of the trial. Not in this district but across the
13 United States in the last 18 months, there have been
14 more than one trial where Jurors during the course of
15 the day, lunch breaks or otherwise, have used their cell
16 phones to access Facebook or Twitter and they just
17 couldn't resist telling their friends how the trial was
18 going.

19 So what that eventually results in is the
20 Court having to grant a new trial and then the time and
21 effort that the parties and lawyers have spent getting
22 to this point will be wasted. So please avoid using any
23 social media websites and the like during the course of
24 the trial, okay?

25 You also should not read any news stories

1 or articles or listen to any radio or television reports
2 about the case or anyone who's had anything to do with
3 it. Third, do not do any research, such as consulting
4 dictionaries, searching the internet or using other
5 reference materials and do not make any investigation
6 about the case on your own.

7 Fourth, if you need to communicate with
8 me, simply give a signed note, either to the briefing
9 attorney, Mr. Woloson who's here, or to one of the
10 security officers outside the Jury room and they'll give
11 it to me.

12 Fifth, do not make up your mind about what
13 the verdict should be until after you've gone to the
14 Jury room to decide the case and you and your fellow
15 Jurors have discussed the evidence. Keep an open mind
16 until then.

17 Now, during the trial it may be necessary
18 for me to confer with the lawyers out of your hearing or
19 to conduct a part of the trial outside of your presence.
20 I will handle these matters as briefly and as
21 conveniently for you as I can, but you should remember
22 that they are a necessary part of any trial.

23 Let's talk about what constitutes
24 evidence. The evidence you are to consider in deciding
25 what the facts are consists of: One, the sworn

1 testimony of any witness. Two, the exhibits which are
2 received into evidence; and three, any facts to which
3 the lawyers stipulate.

4 What is not evidence? The following
5 things are not evidence and you must not consider them
6 as evidence in deciding the facts of this case. Number
7 one, statements and arguments of the attorneys. Two,
8 questions and objections of the attorneys. Three,
9 testimony that I instruct you to disregard; and four,
10 anything you may see or hear when the court is not in
11 session, even if what you see or hear is done or said by
12 one of the parties or by one of the witnesses.

13 Now, evidence may be direct or
14 circumstantial. Direct evidence is direct proof of a
15 fact, such as testimony by a witness about what that
16 witness personally saw or heard or did. Now,
17 circumstantial evidence is proof of one or more facts
18 from which you could find another fact.

19 Now, I'm going to give you an example that
20 I've used in prior cases about the difference between
21 direct and circumstantial evidence. I have a young son
22 and he really likes cake, okay? So that's -- his
23 favorite dessert is cake and occasionally his mother
24 will bake, on Sunday afternoons, a sheet cake, his
25 favorite is the yellow sheet cake with chocolate

1 frosting. She'll set it out to cool in the afternoon
2 with the intention that it be for dessert after supper.

3 Now, occasionally I'll come into the
4 kitchen in the afternoon and a corner will be missing
5 from an otherwise perfectly rectangular cake. And there
6 may be crumbs across the dining room floor into his
7 bedroom. I might find him in the bedroom with chocolate
8 frosting on his cheeks and a smile on his face. I might
9 ask him, now Chance, did you eat that piece of cake.
10 Now, he might tell me no and that would be direct
11 evidence, that's what a witness personally saw or heard
12 or did.

13 And as a parent I might choose to
14 disbelieve that direct evidence in favor of the
15 circumstantial evidence of the missing piece of cake,
16 crumbs across the floor, and the chocolate frosting on
17 his cheeks. So that's why the law allows the Jurors to
18 consider both types of evidence. And you should
19 consider both kinds of evidence and the law makes no
20 distinction between the weight to be given to either
21 direct or circumstantial evidence. It's for to you
22 decide how much weight to give any evidence.

23 In deciding the facts in this case, you
24 may have to decide which testimony to believe and which
25 testimony not to believe. You may believe everything a

1 witness says, part of it, or none of it.

2 In considering the testimony of any
3 witness, you may take into account: One, the
4 opportunity and ability of the witness to see, hear, or
5 know the things testified to;

6 Number two, the witness' memory;

7 Three, the witness' manner while
8 testifying;

9 Four, the witness' interest in the outcome
10 of the case and any bias or prejudice;

11 Five, whether other evidence contradicted
12 the witness' testimony;

13 Six, the reasonableness of the witness'
14 testimony in light of all of the evidence;

15 And finally, seventh, any other factors
16 that bear on believability.

17 The weight of the evidence as to a fact
18 does not necessarily depend on the number of witnesses
19 who testify.

20 Now, you must consider only the evidence
21 in this case; however, you may draw such reasonable
22 inferences from the testimony and exhibits as you feel
23 are justified in the light of common experience. You
24 may make deductions and reach conclusions that reason
25 and common sense leave you to make from the testimony in

1 evidence. Your collective common sense will be the most
2 important tool that you will bring into the courtroom
3 today and throughout this trial. Do not leave your
4 common sense outside the courtroom because that is what
5 will guide you through your decisions and your
6 deliberations.

7 Now, the testimony of a single witness may
8 be sufficient to prove any fact, even if a greater
9 number of witnesses may have testified to the contrary
10 if, after considering all the evidence, you believe that
11 single witness.

12 Now, when a party has the burden of proof
13 on any claim or affirmative defense by a preponderance
14 of the evidence, it means you must be persuaded by the
15 evidence that the claim or affirmative defense is more
16 likely true than not true.

17 When knowledge of technical subject matter
18 may be helpful to the Jury, a person who has special
19 training or experience in that technical field, called
20 an expert witness, is permitted to state his or her
21 opinion on those technical matters. However, you are
22 not required to accept that opinion. As with any other
23 witness, it is up to you to decide whether to rely upon
24 it.

25 Now, during the trial of this case,

1 certain testimony may be presented to you by way of
2 deposition. The testimony of a -- of a witness who, for
3 some reason, cannot be present to testify from the
4 witness stand is usually presented in writing or by way
5 of video, under oath, in the form of a deposition.

6 Such testimony is entitled to the same
7 consideration and, insofar as possible, is to be judged
8 as to credibility, weighed and otherwise considered by
9 the Jury in the same way as if the witness had been
10 present and had given from the witness stand the
11 testimony read or shown to you from the deposition.

12 Now, it's the duty of the attorney on each
13 side of a case to object when the other side offers
14 testimony or other evidence which the Jury believes is
15 not properly admissible. Now, upon allowing testimony
16 or other evidence to be introduced over the objection of
17 an attorney, the Court does not, unless expressly
18 stated, indicate any opinion as to the weight or effect
19 of such evidence.

20 As stated before, the Jurors are the sole
21 judges of the credibility of all the witnesses and the
22 weight and effect of all of the evidence.

23 Now, when the Court has sustained an
24 objection to a question addressed to a witness, the Jury
25 must disregard the question entirely and may draw no

1 inference from the wording of it or speculate as to what
2 the witness would have said if permitted to answer any
3 question.

4 Now, the law of the United States permits
5 the Judge to comment to the Jury on the evidence in the
6 case. Such comments are only expressions of the Judge's
7 opinions as to the facts and the Jury may disregard them
8 entirely since the Jurors are the sole judges of the
9 fact.

10 Is the Rule to be invoked?

11 MR. COLE: We don't need to, Your Honor.

12 MR. MELSHEIMER: We don't need to either,
13 Your Honor.

14 THE COURT: All right. Well, this
15 concludes my preliminary remarks and instructions.

16 Is the Plaintiff ready to proceed?

17 MR. COLE: Plaintiff is ready, Your Honor.

18 THE COURT: Defense ready?

19 MR. MELSHEIMER: We are, Your Honor.

20 THE COURT: All right. Plaintiff, you may
21 make your opening statement.

22 MR. COLE: Thank you.

23 THE COURT: I'll let you know when you
24 have five minutes left. Mr. Cole.

25 MR. COLE: May it please the Court.

1 THE COURT: Mr. Cole.

2 MR. COLE: Good morning. We're here today
3 because the Defendant, SAP, saw our valuable software
4 invention in the market, realized that they needed it,
5 and then decided to just take it for themselves. And
6 that infringed our patent.

7 And as the Court told you, SAP's
8 infringement has already been decided. They infringed
9 the patent. We know that happened.

10 Your question is to decide what is the --
11 what are the damages for that infringement? How much
12 harm did the infringement cause to us? And the evidence
13 will show you that in this industry, software is sold
14 for millions of dollars to very large companies. And in
15 this industry we were successfully selling our patented
16 product to these very large companies, to dozens of
17 them. That is, we were succeeding until SAP took our
18 invention and bundled it into their own competing
19 products and in the process, they turned a once thriving
20 business into a shadow of what it was before.

21 And when SAP made the change to their
22 software that infringed the patent, that is what led to
23 the infringement. That's what brought us here today.

24 Now, my name is Scott Cole, I'm one of the
25 lawyers for the Plaintiff. You've heard the names

1 software is -- that we're going to be talking about is
2 called pricing software and it's software that lets big
3 companies efficiently organize and manage the prices
4 that they set when they're selling thousands of
5 different products to thousands of different customers
6 in thousands of different ways. That's the technology
7 we'll be talking about here in this case.

8 Now, let me give you a little background
9 about Mr. Carter's invention in the area of pricing
10 software and we have to go back to 1995. And Tom Carter
11 was out in 1995 selling Trilogy Software, traveling
12 around the country, talking to hundreds of these big
13 companies about their software needs. And when he was
14 doing that, he noticed that in the area of pricing
15 software, these companies were having some serious
16 problems.

17 Are we -- are we switched to menu? I'm
18 sorry.

19 Ah, there we go. And the problems Mr.
20 Carter saw with the pricing systems that existed at the
21 time was, and you'll hear a lot about these, they were
22 hard to keep up-to-date and keep current. They were
23 also very inflexible; they didn't let these companies
24 implement the kind of pricing strategies they always
25 wanted to do. And the last thing he saw was that the

1 systems were very, very slow and that caused a lot of
2 problems in and of itself.

3 And when he saw these problems, something
4 occurred to him as a way to solve them. Something that
5 cut totally against the grain of the conventional wisdom
6 at the time, and he -- he came up with a solution that
7 solved those problems and was a success in the
8 marketplace.

9 And with Mr. Carter's invention for the
10 very first time, you could actually take one of these
11 big corporate pricing systems and put it on a laptop
12 computer to give to your sales representatives when they
13 would go out and sit in the office with a customer
14 trying to close a deal. And before that, they would
15 have to sit there, try to get the customer interested in
16 a product and then say okay, I've got to go back to the
17 corporate headquarters and tell you how much it's going
18 to cost. And as you might imagine, sales reps do not
19 want to have to leave and go back when they're on the
20 verge of closing a sale.

21 With Mr. Carter's invention, you could do
22 it right then and there. It was a revolutionary advance
23 in the field of pricing.

24 Mr. Carter filed for a patent on his idea
25 in 1996. And the U.S. Patent Office reviewed it and

1 agreed that it was deserving of a patent, and this is a
2 copy of the '350 patent or the Carter patent, it's
3 Plaintiffs' Exhibit 2, you'll see this during the course
4 of the trial.

5 And not only did he file for a patent, he
6 also built a product based on his patented idea. He
7 built a product called Pricer and then Trilogy set out
8 to go sell that to the marketplace and build a business
9 around it. And when Pricer was launched, the
10 marketplace immediately saw the value that was there.

11 This is an article in February of 1998.
12 This is a couple of years after Pricer was launched and
13 this is from USA Today newspaper. And they're noting
14 here that software pioneers, and that's talking about
15 Trilogy, had taken the pain out of pricing. And the
16 quote you see here is from a guy named Jack Maynard of
17 the Aberdeen Group and who that is, that is -- that's a
18 consulting group that is paid by big companies to
19 evaluate software options and make recommendations to
20 these big companies on what they should buy. And as he
21 said in 1998, Trilogy was the Rolls-Royce of the pricing
22 industry.

23 In the first three and a half years that
24 Trilogy was selling Pricer, this new product, from 1995
25 until late 1998, they sold it to over 50 companies.

1 Many of them some of the largest companies in the world;
2 Goodyear, Whirlpool, Bridgestone Tires and many, many
3 more.

4 Now, as -- as Trilogy was making these
5 sales and as Pricer was taking off in the marketplace,
6 another company noticed the product as well and that
7 company was SAP. SAP was also selling business software
8 at the same time to the same kinds of companies. And
9 what SAP saw when they saw Pricer was something
10 different. They saw a threat.

11 This is an internal SAP e-mail from
12 November of 1997. This is, again, before SAP introduced
13 the feature that changed their product. And they're
14 talking about a sales opportunity that they were looking
15 at for Goodyear Tire. As you can see here, there's an
16 urgent situation at Goodyear. They have possibly 2,000
17 seats at risk, and what a seat is that's like an
18 individual software license. In other words, Goodyear
19 would be buying 2,000 licenses to software.

20 SAP wanted that business and they saw that
21 Trilogy was there pushing their pricing offer. And it
22 was particularly concerning to SAP because Goodyear was
23 one of SAP's oldest customers and if Trilogy could win
24 that account, it would be a major win. Well, SAP's
25 concern was justified because Trilogy did win that

1 account. They won the Goodyear business.

2 Now, let me tell you a little more before
3 we go further about SAP. SAP is the third largest
4 software company in the world behind Microsoft and
5 Oracle. They're based in Germany and their traditional
6 strength is in the area of what's called back office
7 software. It's a part of business software that's
8 designed to handle things like manufacturing or
9 accounting or warehouse and inventory. The things that
10 are different than when you actually go and talk to the
11 customer, like the Trilogy software was.

12 And SAP was very, very successful in back
13 office software. And by the mid '90s and the late '90s,
14 they really dominated that industry. But having
15 dominated that industry, it leads to a bit of a
16 challenge, which is how do we grow from here? Once
17 we've gone this far, how do we keep growing. And in
18 order to grow, they needed new products. They needed
19 new ideas and new things to offer their customers.

20 And so when SAP heard about Pricer, they
21 saw a threat as you saw, but they also saw an
22 opportunity. And one of the things SAP thought about in
23 the early days, this is in May of 1997, was maybe we
24 could enter into negotiations with Trilogy to purchase
25 the code for SC Pricer. This is an e-mail from a guy

1 named Dr. Bernhard Neumann, and you'll hear his name a
2 number of times.

3 So one thing they thought about, let's
4 talk to Trilogy about this product and maybe we can buy
5 it, maybe we can pay them for this new product so we can
6 offer it. But that was not the decision SAP ultimately
7 made.

8 Instead, what they decided to do was to
9 just take Mr. Carter's idea and bundle that into their
10 own products, sell them themselves, and pay Trilogy
11 nothing.

12 And when that happened, Trilogy's sales
13 that had been -- Trilogy's sales that had been very
14 successful up until that point slowed down to --
15 sorry -- sorry. Somehow I got off on my PowerPoint.

16 VIDEO TECH: Scott, you need to turn the
17 switch on.

18 MR. COLE: Oh, there you go. Sorry. This
19 is why -- do you have the -- the customer chart? Well,
20 I -- I apologize, I had a chart in there.

21 Anyway, what you'll -- you will see
22 shortly a -- a demonstration of how much Trilogy
23 Software sold in the market and from 1995 until 1998
24 when SAP made the change to their software, you will see
25 about 60 customers that bought Pricer before SAP changed

1 its product. And the sales went from two in 1995, then
2 they sold sixteen new customers in 1996, and then
3 eighteen new customers in 1997, twenty-five new
4 customers in 1998, and that's when SAP introduced their
5 new feature. And once that happened, in 1999 at the
6 very height of the technology boom, SAP's Pricer sales
7 went from twenty-five to seven, and then four and then
8 one and then finally to none.

9 And that -- all of that happened once SAP
10 took our idea and put it into their own product. That's
11 what they did. They took Mr. Carter's idea. Rather
12 than paying for the source code, they bundled it into
13 their own product, sold it in competition with us and
14 destroyed a business that was booming before that. So
15 that's what they did. That was what they did.

16 Let's talk a little bit about why they did
17 it. Why did they go about it this way.

18 The reason is, to understand now we got to
19 go back in time. About a year before they introduced
20 the new feature, to 1997, the feature was introduced in
21 October '98, this is about a year before that. Again,
22 this is Dr. Bernhard Neumann, an SAP engineer, and
23 they're discussing a problem they were having at this
24 time.

25 He says, I'd like to make you aware of

1 some recent opinions from Paul Wahl. And Paul Wahl was
2 the number one guy at SAP's America operation, he was
3 the head of their U.S. operations. And the concern is
4 there's a fact that more and more SAP America sales
5 people are recommending our prospects and customers use
6 Trilogy's configurator and pricing engine.

7 Now, think about that for a minute. SAP's
8 own sales people are recommending that their customers
9 use Trilogy's pricing solution. SAP had their own
10 pricing solution at the time, but it had all those
11 problems that Mr. Carter had seen. And because Pricer
12 was that much better, SAP's own sales people were
13 recommending it, they were recommending a competitor's
14 product. That gives you a sense for the problems SAP
15 was having at the time.

16 Not only that, they saw that because of
17 the problems they were having, Trilogy was raking in the
18 cash among their customers and they didn't like that.
19 And Dr. Neumann, again, the same guy, again 1997, he was
20 really candid, he acknowledged it bothered him, bothered
21 him that Trilogy was always one step ahead in this
22 market.

23 But not for long because back at SAP's
24 research and development group in Germany, they were
25 studying Pricer to figure out how it worked to

1 understand why it was better and to decide how could
2 they improve their products to make it work like
3 Trilogy. And their goal was clear. This is the goal in
4 the research and development of coming up with a new
5 pricing product. The goal was to stop Trilogy. That's
6 why they were making the changes to their software
7 product. Let's stop Trilogy and build market share in
8 the SCE/SPE market. And SPE stands for sales pricing
9 engine and that was a pricing product that SAP was
10 working on to compete with Trilogy.

11 And once they learned about Pricer, once
12 they saw how it worked, they decided that their original
13 goal for R&D, their original approach to build a new
14 product was wrong. They needed to change their
15 development strategy. Here in 1998, this is a few
16 months later but still seven months before they came out
17 with the infringing feature, you can see here, this is
18 from Paul Wahl, again the number one guy at SAP's United
19 States operation, and he's sending it to a number of
20 people, including the guy at they very end, you see
21 Peter Zencke. And Dr. Zencke was the worldwide head of
22 SAP's R&D Department and they're talking about the sales
23 pricing engine that they were working on. You see here
24 this is internal distribution only.

25 And in background he says the original

1 requirement of the SPE was to provide standard R/3
2 pricing in its detached mode; in other words, the
3 original requirement was to use our normal pricing
4 approach, R/3 was a SAP product, use our normal approach
5 and try to put that on a laptop. That's what we should
6 do.

7 But as you can see due to market pressures
8 from Trilogy and SAP development plans, the competitive
9 landscape has changed. And because the competitive
10 landscape changed, they changed their development
11 efforts and that led to this feature.

12 You'll hear this word a lot, hierarchical
13 access. In hierarchical access, that's the pricing
14 system that SAP came up with that included Mr. Carter's
15 invention that they sold in their own products. This
16 came out in October 1998. And what you see here, this
17 is a document that SAP would give to its customers that
18 bought hierarchical access explaining why it's valuable.

19 And what's interesting about this document
20 is they're now candidly talking about the problems they
21 had before hierarchical access, because now they have
22 the solution they can say, you know, before we had this
23 solution, we were having a bunch of problems. See,
24 without hierarchy access you would need to -- and
25 there's a lot of technical stuff there that we'll

1 explain -- but denote they're honest about it, this
2 would not only take a great deal of time, in other
3 words, it would -- it would be a pain to maintain and
4 keep up-to-date, but without hierarchical access your
5 system performance would be reduced. It would run
6 slower, again another advantage to Mr. Carter's
7 invention provided was the speeding it up.

8 It would force the system to use a rigidly
9 fixed sequence of accesses. The old system was
10 inflexible; the new system was flexible, just like
11 Mr. Carter's invention. And they note that this is a
12 major drawback especially for hierarchical data like a
13 product hierarchy or a customer hierarchy, you'll hear a
14 lot about hierarchies in this case, but the thing to
15 remember for now is the infringing hierarchical access
16 was especially made and especially beneficial for
17 hierarchies like customer hierarchies and product
18 hierarchies.

19 So that's the background. Those are the
20 facts that brought us to the infringement determination
21 that was found and sets the stage for the main issue for
22 you, which is damages.

23 Now, to prove the amount of harm that's
24 been caused, here we will explain to you what
25 Mr. Carter's invention was, how it succeeded in the

1 marketplace, and why it's valuable. We think the
2 evidence will show it was a very valuable invention.

3 And our claim here is if SAP had not taken
4 our technology, put it into their own products and sold
5 it to our customers, we would have made additional sales
6 just like we were making before they did that. And our
7 claim is that if SAP hadn't infringed, we would have
8 done the -- had the same kind of success that we had in
9 the real world before they did this. And our claim is
10 called -- it's called lost profits, that's the claim we
11 are making, that we lost sales and lost profits because
12 of SAP's infringement. And that claim is based upon the
13 actual history that we had before this all happened to
14 us.

15 And here are -- here are the figures
16 you'll see. In 1996, '97, and '98 before SAP came out
17 with hierarchical access, we sold eight new customers,
18 and these are just the Fortune 500 big companies, we're
19 only claiming lost sales on them, eight Fortune 500 type
20 companies in '96, and then eleven and then twelve.
21 That's what happened in the real world. And once SAP
22 infringed, that fell off a cliff.

23 Our -- our claim, is that when our patent
24 issued, it issued a little later in 2003, we would have
25 experienced the same success we did before they took our

1 technology. It's a -- it's based on history and facts
2 in the real world, and we would -- we would have made
3 the same sales, we actually start out a little lower
4 than we did in the real world getting up to twelve new
5 customers a year, that's what we did in 1998, and then
6 rather than continuing to grow, we just assumed we would
7 have leveled off at twelve. This is the period of time
8 SAP was infringing.

9 They made infringing sales throughout this
10 whole time period, and during that time period they --
11 the evidence will show you that SAP sold the infringing
12 software to about thirteen hundred customers, thirteen
13 hundred customers, and during the period of time
14 we're -- we are -- we are going to show you that we
15 would have lost about ninety-three customers total out
16 of the thirteen hundred that they sold and about four
17 hundred and thirty of those were the Fortune 500 types,
18 that's -- that's what the evidence will show.

19 And the evidence will also show you that
20 when Trilogy made a sale of Pricer, it was -- it was
21 valuable enough that the profit we would make on a
22 typical deal for a big company was about three million
23 dollars per customer. So it was about three million
24 dollars each and we lost about ninety-three customers
25 during an eight-year period of time. That works out to

1 about thirty-five million dollars a year in lost
2 profits, over the whole time period, over all those
3 sales, it's about two hundred and eighty-five million
4 dollars. That's -- that's the harm that was caused
5 here.

6 But we believe -- it's a lot of money, but
7 we believe it's realistic because it's based upon actual
8 history, what we actually did in the market before SAP
9 took our technology.

10 But SAP will tell you, it should be no
11 surprise, that they don't agree with our damage model.
12 They don't think that's realistic and SAP will tell you
13 that we didn't lose a single sale, not one sale because
14 of their infringement. That's their position in this
15 case, not a single sale was lost because of their
16 infringement.

17 And they're going to have a lot of
18 arguments around that and -- but if you boil down SAP's
19 case, basically what they are going to tell you is
20 Mr. Carter's invention was valueless. Nobody cared
21 about it. It wasn't worth anything or hardly anything.
22 They're going to have a lot of ways to explain that to
23 you.

24 They'll -- they'll show you some Trilogy
25 e-mails back at the time that our sales started to slow

1 down, they were self-criticizing Pricer, wondering what
2 was going on, blaming ourselves for the -- for the
3 problems and they're going to tell you that means this
4 invention is really worth nothing or almost nothing.

5 And they're going to tell you that the
6 hierarchical access feature they introduced, the one I
7 showed you that solved the problems, they're going to
8 tell you none of their customers care about that.
9 Nobody uses it in the way Mr. Carter described and it's
10 just not a big deal at all.

11 But there's something that really is -- is
12 something very, very relevant on that point and that
13 brings us to the last thing that you will need to decide
14 which is: Does SAP still infringe after they changed
15 their product?

16 So Judge Everingham told you, in May of
17 2010, this is after they were determined to infringe, in
18 May of 2010, SAP made a change to its product so that
19 they could come in here today and tell you that they
20 don't infringe anymore. They've stopped infringing, not
21 a big deal. That's what they're going to say. But
22 after they were found to infringe, after that was
23 decided, they didn't just quit. They didn't take
24 hierarchical access out of their system. They left it
25 in. That is not -- they didn't pull it out, even though

1 they're going to tell you nobody cares about it and
2 nobody uses it and it's valueless, they left it in even
3 after they were found to infringe. That speaks volumes.

4 And let me tell you a little bit about
5 what they did. They didn't take hierarchical access
6 out, what they did was they made a very small change to
7 some of the tools you can use to edit hierarchical
8 access. And they implemented this change, in other
9 words they rolled this change out to their customers
10 through something called an SAP note. It's kind of a
11 funny name, but basically this is a document that tells
12 SAP's customers we're making a change to our product,
13 here's what the change is and here's who it applies to.
14 This came out in May of 2010, after they were found to
15 infringe.

16 And you can see here, this is -- the thing
17 I have blown up here is the very first thing they tell
18 their customers in the note describing this change.
19 This is the very first thing. They'll tell -- they're
20 telling their customers this and related notes implement
21 a change to the functionality of the hierarchical access
22 feature, hierarchical access change. Now, the important
23 part is the highlighted section. Application of these
24 notes, in other words taking this change is required,
25 but only for customers who obtain their initial license

1 for an SAP system after May of 2010.

2 Now, let's think about that for a minute.
3 They're telling their customers right off the bat, the
4 only people who -- who need to take this change are
5 people who have never had an SAP product until May of
6 2010. But the reality is SAP has dominated this
7 industry for a long time and the vast, vast majority of
8 their customers have been SAP customers long before May
9 of 2010.

10 And so right off the bat they tell their
11 customers 99 percent of them, I mean, I -- I don't have
12 a precise number, but some very high percent of them,
13 you don't have to worry about this at all, it doesn't
14 apply to you. And not only that, even for the people
15 who did get the change, who did take the note, they
16 grandfather in all of the access sequences, the
17 infringing access sequences that existed before they
18 made the change.

19 This is telling you for the people who
20 actually take this change, existing access sequences of
21 the type hierarchical access created before this note,
22 in other words created before 2010, will continue to
23 function as before. So they grandfathered in all of
24 these existing data structures for all of the customers
25 that they sold hierarchical access to from 1998 until

1 2010. That is twelve years worth of sales, and they
2 exempt all those data structures from their change.

3 THE COURT: You have five minutes
4 remaining.

5 MR. COLE: Thank you.

6 SAP is going to tell you that when they
7 made the change, nobody complained and that proves to
8 you that this change -- that this feature is irrelevant
9 and nobody cares about it because no one complained.
10 But the reality is no one complained because nobody who
11 cares about it had to suffer any consequences as a
12 result of this. All the people who use and care about
13 this thing got grandfathered in.

14 So this is a big and it's an important
15 case. You can tell from the courtroom there's a lot of
16 attention being paid here. This is an important case.

17 And as I said at the beginning, the
18 fundamental facts here are that SAP they saw our
19 invention in the marketplace, they realized that they
20 needed it to fix their problems, and then they just took
21 it and paid us nothing. And now they're going to tell
22 you that they should have to pay us almost nothing even
23 after they infringed.

24 Thank you very much.

25 THE COURT: Thank you, Mr. Cole.

1 MR. MELSHEIMER: May I have one moment,
2 Your Honor?

3 THE COURT: Yes.

4 (Pause.)

5 MR. MELSHEIMER: May it please the Court.

6 THE COURT: Mr. Melsheimer.

7 MR. MELSHEIMER: Ladies and Gentlemen,
8 you've heard their side of the story, and the evidence
9 will demonstrate that their story is inconsistent with
10 the facts, inconsistent with the evidence that you'll
11 hear and simply unreasonable.

12 I told you last week in jury selection
13 that SAP was willing to pay a reasonable amount for use
14 of the patented invention, but we were not willing to
15 pay for something unreasonable. We were not willing to
16 pay for lost profits that would never have occurred
17 under any circumstances.

18 You see, Versata or Trilogy, they want to
19 take credit for their successes. They want to claim all
20 the credit, but they don't want to take responsibility
21 for their failures.

22 And that's not how it works in this
23 country. We're willing to pay what's fair and
24 reasonable and will do so, but we're not willing to pay
25 for something that's exaggerated and not supported by

1 the evidence.

2 Good morning. My name is Tom Melsheimer,
3 as you know, and I'm here on behalf of the SAP. You'll
4 hear some folks, you'll see some folks from our team.
5 Mr. Childs from SAP, you met him a week or so ago;
6 Ms. Skinner, my colleague; Mr. Bittner; Todd Clayton.
7 Mr. Clayton -- you'll see these folks during the trial.
8 You'll also see Mr. Jim Batchelder, who you met on the
9 first day of jury selection.

10 I'm here to tell you SAP's side of the
11 story. But before I do that, I want to focus on a few
12 facts that I don't think will ever be disputed in this
13 case, and they're quite a bit different from the facts
14 you just heard from the Plaintiffs' lawyer.

15 Fact number one, you will not hear a
16 single customer testify that they decided not to buy,
17 not to buy Versata's Pricer product because SAP had this
18 hierarchy access pricing feature. Not a single
19 customer. Even their own witnesses will admit that
20 they've never heard of that happening.

21 But they want to say is that somehow
22 because we added this feature to our software that that
23 put them out of business when, in fact, no customer ever
24 said they didn't buy Versata or Trilogy because of that
25 feature in SAP.

1 Fact number two, and this is important,
2 back in 1998 when SAP added this pricing feature, there
3 was no infringement of any patent.

4 Let me say that again. When we added this
5 feature in 1998, there was no infringement of any
6 patent. The patent didn't come up until 2003. Fact
7 number two.

8 Fact number three -- it's very
9 important -- for the time there was infringement, for
10 that period of time that infringement was determined, it
11 was not determined that that infringement was deliberate
12 or intentional. It was not determined that it was in
13 any way intentional. The legal term for that is
14 non-willful.

15 Now, you've heard this allegation -- you
16 just heard it -- that we somehow copied or took
17 something from -- from them, but, in fact, we didn't.
18 We used our own engineers. We wrote our own software.
19 We did our own work. The infringement was not willful.
20 And no one will say otherwise.

21 Because of these facts, these three facts
22 and others that you'll hear, we have refused to pay what
23 they've asked for because we believe it to be
24 unreasonable. We've instead been patient.

25 We've chosen to bring forth evidence to

1 show what is truly reasonable for the narrow feature
2 involved in this case. Not the picture that Versata
3 paints, but a very small part of SAP's software, a
4 software that has literally hundreds of thousands of
5 different features.

6 So let's talk some more about the evidence
7 you'll see in this case. I want to talk to you first
8 about SAP and its software and about how this particular
9 pricing capability fits within the many thousands of
10 features that SAP has.

11 Next, we're going to talk about what
12 happened after SAP added this hierarchy access feature
13 in 1998 before Versata got a patent in 2003.

14 And finally, I want to talk about the
15 damages claim in this case. I'll give you some examples
16 of why their damages claim just doesn't make any sense.
17 It doesn't square with what the Judge told you is the
18 most important thing you bring to this courtroom, your
19 common sense.

20 Let me talk to you first about SAP and its
21 software. SAP is a company that helps many companies
22 and organizations all over the world run their business.
23 As you've heard, we're based in Germany, but we have our
24 roots in an American company called IBM.

25 About 40 years ago, a handful of engineers

1 left IBM to start SAP, and they had a vision or an idea
2 to come up with a software that could run all aspects of
3 a company's business, all aspects.

4 So this is a different kind of software
5 program than you might have heard of. It's
6 comprehensive and customizable to fit the needs of any
7 business. You probably use Word or maybe PowerPoint.
8 These -- those programs are pretty complex, but this
9 program is quite a bit different.

10 It allows an organization, whether it's a
11 business or a church or a charity to manage their entire
12 company. It can help organizations hire and manage
13 personnel, order material, manufacture products, create
14 financial reports, schedule employees, and just about
15 anything else a business needs to do. They call it
16 managing the business from A to Z. That's what SAP
17 does.

18 Now, it sounds simple in a way to say
19 that, but, in fact, the software is very complicated.
20 It has 150,000 screens, 150,000 screens. So it would be
21 impossible to describe to you all the different features
22 and functionalities.

23 In fact, there are whole books devoted to
24 nothing but SAP software. And you'll see some of these
25 books in the trial that lay out all the different

1 qualities and features of SAP software.

2 Now, because of this, because it's very
3 comprehensive, it's flexible, and it's used by many
4 different businesses and organizations.

5 Let me just give you a sampling of the
6 kind of organizations that you'll see: UPS, NASA,
7 Proctor & Gamble, the Red Cross, the Southern Baptist
8 Convention, Harley-Davidson, all varieties of
9 businesses, some charities, some for-profit businesses,
10 some government-type organizations.

11 So if you're a chemical company, maybe you
12 need to order many chemical supplies that your plant
13 uses. SAP can do that.

14 If you're part of the military, maybe you
15 need to track parts and equipment for soldiers. SAP
16 does that.

17 If you're a railroad, maybe you need to
18 arrange a schedule for hundreds of trains and thousands
19 of employees. SAP does that.

20 The name for the software is called ERP,
21 Enterprise Resource Planning. It simply means that any
22 enterprise, any organization can use SAP to make its
23 business work better.

24 Now, it's much broader and more
25 comprehensive than the kind of software Trilogy was

1 selling. Trilogy was focused on a very narrow set of
2 products. The SAP product is comprehensive.

3 Now, one thing the software had been doing
4 at SAP for decades was pricing. SAP software had all
5 sorts of tools and options for customers to use pricing
6 long before -- long before Trilogy ever came along.

7 It could use hierarchies before Trilogy
8 came along. It could use customer information before
9 Trilogy. It could use product information. In fact, it
10 had dozens of options for businesses to use for setting
11 their prices.

12 Now, you've heard from the Plaintiff that
13 maybe these options weren't so good, but SAP customers
14 who used pricing, and not all the customers do use it
15 for pricing, they like these features, and they use them
16 successfully.

17 Now, is this to say that SAP is never
18 trying to improve on its software? Of course not. It's
19 not perfect. SAP's constantly looking for ways to make
20 its software better.

21 And it's because of one of those
22 improvements, one feature among hundreds of thousands
23 that we're here about today. That's this hierarchy
24 access pricing feature that's being discussed.

25 Now, it was added in 1998.

1 Can I get the ELMO, please, ma'am?

2 COURTROOM DEPUTY: Yes, sir.

3 MR. MELSHEIMER: So the feature was added.
4 In 1998, the feature that we're talking about in this
5 case was added, all right? There's some important dates
6 I want to help us keep track of.

7 Now, was this a major upgrade? Was it
8 some drastic change? No, it wasn't. It was not major
9 at all. It added one more option to the many pricing
10 options already existed.

11 Did SAP want to add it? We did.

12 Was it an improvement? Sure it was.

13 But was it big news to the company after
14 it happened? Was it a game-changing feature? It turned
15 out it wasn't. It wasn't even close. And you'll
16 hear -- you will hear evidence about that.

17 Now, as you think through the issues in
18 this case, one issue that you'll have to address is, how
19 much, how much is that one pricing feature worth among
20 the thousands of features in SAP's software code?

21 Now, you might think, well, that depends
22 on how important that one feature is, or it might depend
23 on how much that feature affected Trilogy's business.
24 And those are good questions.

25 I want to look at that with you during the

1 evidence in this case. And to do that, we'll turn to
2 the time period between 1998 and 2003. Because you may
3 have missed this, but the patent in this case didn't
4 issue until 2003. 1998, we add the feature; 2003, the
5 patent issued.

6 Now, what's going on in this timeframe?
7 What's going on between 1998 and 2003? Well, it turns
8 out that Versata Trilogy sales were dropping during this
9 time period. They were dropping during the time period
10 from 1998 to 2003.

11 Now, they want to tell you that that's our
12 fault. They want to blame us for that dropoff in their
13 sales. But what's the evidence that you'll see in the
14 case?

15 Well, the first thing we know is that in
16 1998, when we add this feature, we're not infringing
17 anyone's patent. Not in 1999; not in 2000; not in 2001;
18 not in 2002. No one can claim, not Trilogy, not
19 Versata, not anyone can complain -- can claim ownership
20 of this pricing feature during that time period. So
21 it's totally public until 2003.

22 Now, let me mention one other point about
23 this time period. The law has a lot of remedies for
24 companies who think they're being harmed. You've heard
25 this accusation in the opening that we took it, that we

1 copied them.

2 But if Trilogy thought we were doing
3 something wrong in 1998, 1999, 2000, 2001, they had
4 remedies available. But you won't hear in this trial
5 that anyone says that there's been any determination
6 that SAP stole anything from Trilogy, that we took their
7 source code, that we broke a promise that we made to
8 them, or that we interfered with their business.

9 For example, you'll hear about SAP signing
10 an agreement with Trilogy in the '98-'99 time period to
11 exchange certain information. If they thought we were
12 breaking that agreement because it was an agreement to
13 keep it confidential, they could have brought that
14 claim, and they have never done so.

15 And in the same way, you won't hear
16 that -- any claim that SAP infringed any other patents
17 between 1998 and 2003.

18 So what SAP did with Versata and Trilogy
19 in 1998 was not patent infringement, and it was not any
20 other violation of law, and no one in this case will say
21 otherwise. SAP wrote its own source code, used its own
22 employees, all to come up with a way to compete with
23 Trilogy. We did that, and I don't think those facts
24 will be disputed.

25 Now, let's turn to another question,

1 though. Did anything we did in this time period, '98
2 and following, did that have anything to do with the --
3 why the sales of Pricer dropped?

4 You heard him say our sales went down. To
5 put it more specifically, did adding this feature in
6 1998 in SAP's software, did that cause the sales of
7 Pricer to go down?

8 As I told you, you're not going to hear a
9 single potential customer say: I didn't buy Pricer
10 because of SAP -- not one customer -- because of that
11 hierarchical access feature.

12 So what's really going on? What's the
13 truth? Well, the truth is, is that early on in the
14 mid-'90s, Versata -- Trilogy's Pricer software was
15 attractive. It was an attractive product for a small
16 group of companies that had very complex pricing needs.

17 But after those companies bought Pricer,
18 there weren't a whole lot of other companies that wanted
19 to pay close to 2 million or \$3 million for pricing
20 software. You don't have to accept what I'm saying
21 about that. This is what --

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22         Can I have the -- the other screen?
23     Sorry.
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24 COURTROOM DEPUTY: Yes, sir.

25 MR. MELSHEIMER: This is what Trilogy is

1 saying in their own documents. Let's take a look at it.
2 So let's look at Trilogy's documents back in 1998. 514,
3 e-mail internal within Trilogy, December 1998.

4 Now, he says: Obviously, I did not want
5 to broadcast this note. However, I think there's a
6 large point being missed here. Our software is not what
7 we think it is. After selling numerous deals at
8 Trilogy, I think our greatest core competency is our
9 presale staff. They spin all manner of stories to sell
10 our code. When someone attempts to deploy the code,
11 it's a nightmare.

12 Can we go to 514, Mr. Barnes?

13 Now, what do they say in February of 1998?

14 After eight months of working with this
15 market segment, SC Pricer has failed to reach
16 acceptance. The SC Pricer team has met with over 40 SAP
17 and Oracle companies -- that's companies that run SAP or
18 Oracle software -- to run their business. Only one of
19 these companies have subsequently purchased the
20 software.

21 So this is back in 1998. They're saying
22 in their own documents they're having trouble selling
23 their software in the mainstream. No mention of SAP.
24 No mention of hierarchy access.

25 Now, one thing they could have done -- and

1 you'll see this in the evidence -- is they could have
2 cut the price of their product. They could have slashed
3 it down to \$100,000 or \$50,000. You'll see documents
4 where their own people say: If we want to make more
5 sales, we're going to have to cut the price. But they
6 didn't do that.

7 So you're going to see some interesting
8 facts, I think, about Trilogy and the way they ran their
9 business. Some lavish expenditures on things that maybe
10 weren't pushing their business forward. You'll have to
11 ask yourself if all the money they spent, was it really
12 promoting the development of Pricer.

13 Well, what happened, though? What
14 happened to Trilogy during this time period? Well, you
15 had customer dissatisfaction.

16 This is a survey they commissioned in
17 2000, and what did they learn in 2000? That 57.5
18 percent of the customers surveyed said that Trilogy had
19 fallen short of expectations.

20 Now, that's not something SAP did; that's
21 something Trilogy did with their people and their
22 software not providing and satisfying people's
23 expectations.

24 Now, does that sound like the mark of a
25 responsible business to come in and say: You know what,

1 SAP; you're responsible for all this; we want you to pay
2 us for the lost sales?

3 But I tell you what. There was a time
4 when people at Trilogy took responsibility. I want to
5 show you something written a long time ago by that
6 gentleman right there, Mr. Tom Carter. I hope you're
7 going to hear from him as their first witness. He's a
8 bright fellow.

9 When they were having trouble back in
10 1998, he took responsibility for it. You heard about
11 him. What does he say?

12 Trilogy development in SAP: We've
13 absolutely screwed up. I have absolutely screwed up.
14 I've personally been involved in several SAP
15 installations and did the minimum necessary. I
16 absolutely saw all the data in front of us. I've
17 absolutely known what we needed to do and failed.

18 So, yes, our organization of stars has
19 completely failed, failed to do what we've needed to do.

20 You can admire someone, frankly, who's
21 willing to speak like that, make that kind of admission.

22 So what happened between this point and
23 now? Because Mr. Carter has long since left the
24 company. And he'll tell you that. He left the company
25 five years ago.

1 So what's happened between now and then
2 when we find ourselves in this courtroom? We'll talk
3 about that.

4 But one thing we know for sure is that it
5 was not this software feature of SAP that drove Pricer
6 sales into the ground. It was not SAP software, because
7 the evidence will show that there were thousands of
8 companies out there that were not using any pricing of
9 SAP, that weren't SAP customers.

10 If their product, if Trilogy's product was
11 really so whiz bang, they could have sold to all those
12 companies. They're would still be making plenty of
13 Pricer sales in 2001 and 2002. But they're not.

14 So what was it? If it wasn't SAP, what
15 caused Pricer sales to drop?

16 Well, you're going to hear a lot of things
17 about that. You're going to hear about some changes in
18 technology, like speeds of computers and access to the
19 internet that started in 2000 and 2001 that ended up
20 making Trilogy's product just not as good as it was.

21 That's not a criticism of Mr. Carter or
22 his idea; it's just changing in technology that made it
23 not as useful to people.

24 And finally, it couldn't have helped.
25 Right around 2000, what was happening? Remember all the

1 panic and mania about Y2K?

2 Well, a lot of companies were focusing
3 their spending on Y2K problems, not on buying new
4 software for pricing. So it's no surprise, during all
5 these circumstances, that Trilogy might see its software
6 drop.

7 So let's look at this point between
8 2003 --

9 Can I have the ELMO back?

10 Let's look at this period after 2003,
11 because that's the period that we're talking about with
12 damages, okay? We're talking about 2003 and later,
13 because, again, they can't get any damages for anything
14 that happened earlier because they didn't have a patent.

15 The first thing to remember is: What was
16 the infringement? Well, remember, it was not
17 deliberate. It was not intentional.

18 Now, under the patent laws, you can be
19 liable for infringement even if you didn't know about
20 the patent. And the evidence in this case is that we
21 didn't know about this patent until years later. They
22 didn't tell us. They didn't write us a letter. They
23 didn't tell us about it.

24 But that doesn't matter. You can still be
25 responsible for infringement. But that doesn't mean

1 that you've done it deliberately or intentionally. And
2 we're not challenging that here. We understand the law,
3 and we respect our obligations.

4 And even though we weren't determined to
5 deliberately infringe, we understand that we need to pay
6 a reasonable amount, a reasonable amount for the
7 infringement that was found.

8 So don't make -- don't let Trilogy make it
9 out to sound worse than it is. You heard them say we
10 took; we copied; we stole. That was the suggestion.
11 Well, you know what? That's not what this case is
12 about. What this case is about is valuing that damages.
13 What are the damages, and what's the valuation of it?

14 So let's talk about that. Let's talk
15 about what's the calculation of damages in this case.
16 And I want to hear -- I want to start with something
17 that you've heard from the Judge already, and you're
18 going to hear it again.

19 The purpose of damages is not to punish.
20 You must not, however, award Versata more damages than
21 are adequate to compensate for the infringement nor
22 shall you include any additional amount for the purpose
23 of punishing SAP or setting an example. That's the law.

24 And you know what? That kind of squares
25 with your common sense, doesn't it? Because it doesn't

1 make any sense to punish someone when the infringement
2 has not been determined to be deliberate or intentional.
3 And no one will dispute that in this case.

4 Now, what they say is, Trilogy Versata
5 says, they're entitled to lost profits. We disagree.
6 Why we disagree that they're entitled to any lost
7 profits is because, first of all, they basically stopped
8 selling Pricer. They stopped selling Pricer long before
9 the '350 patent issued in 2003 for reasons unrelated.

10 Any lost profits, any problems that
11 Versata had making sales in 1998, 1999, 2000, 2001,
12 that's their own responsibility. That's not something
13 they can turn around and place on us.

14 I'm going to prove to you, showing you
15 Versata's own documents, showing you testimony from
16 their own witnesses, that the problems that they had
17 were their own fault, their own responsibility.

18 We'll also bring you an economist,
19 Dr. Stephen Becker, who will go through the lost profit
20 calculation with you. He'll explain to you a lot of
21 problems with it. You'll hear from him in a couple of
22 days, but let me -- let me -- let me give you a sense of
23 this.

24 One of the things you have to look at for
25 lost profits is, what's the demand for the feature?

1 What's the demand for the feature they claim is part of
2 their patent, this hierarchy access?

3 In other words, did this one feature, did
4 us putting that in our product that had thousands of
5 features, this one feature, cause people to rush to SAP
6 and buy the software?

7 He's going to tell you, not at all, that
8 that's not the case, because -- most important reason --
9 no one, no customer has ever come forward, even after
10 all -- as long as this case has been going on, no
11 customer has ever cited this feature as a reason to buy
12 SAP software.

13 Now, it's true. We thought it would be a
14 good feature, so we added it to our hundreds of
15 thousands of features, but it turned out that no one
16 ever really used it.

17 Now, that's not a surprise, because it's
18 going to turn out that even though the infringement has
19 been determined, it's actually never been determined
20 that anyone actually uses this feature, that any
21 customer actually does pricing in the way that Trilogy
22 says is described in their patent.

23 Now, that may sound odd. The reason for
24 that is this is a special kind of patent. The '350
25 patent claims only require the capability of doing the

1 special pricing, the capability, not the actual doing
2 it.

3 So if the software code makes it possible,
4 there's infringement. But when asking how much that is
5 worth, whether or not that drives demand, you need to
6 look at, okay, do people actually use it? Is it
7 something important? Is that capability important?

8 THE COURT: You've got five minutes
9 remaining.

10 MR. MELSHEIMER: Now, let's look at some
11 of the evidence -- the other evidence you'll see in this
12 case and how unimportant this pricing feature was to
13 customers.

14 We'll bring you Dr. Ray Mercer.
15 Dr. Mercer has looked at the changes that SAP made to
16 the software code after it was determined that SAP
17 infringed, and he'll explain to you that SAP has
18 disabled the features. And it's not the story that you
19 heard about from the Plaintiff in the opening.

20 Secondly, he will tell you that he's done
21 research and analysis on exactly why this little feature
22 is not something that was important to SAP software or
23 the sales of the software or the customers buying the
24 software.

25 So let's turn back to damages. They're

1 going to ask for lost profits, and one of the things
2 you're going to need to look at is, how much profit
3 Versata would gain on a lost sale, if they even made a
4 sale at all?

5 And, again, you'll see that their approach
6 to damages is the same unreasonableness that you'll see
7 throughout the case. They overstate what they would
8 make; they understate their costs. And they do that to
9 create the impression of a greater profitability, a
10 greater lost profit. You'll see that in the evidence.

11 Now, do they get nothing? If they're not
12 entitled lost profits, do they get nothing? No. No.
13 The law that governs this case is pretty clear. If
14 Versata can't prove lost profits, then they are still
15 entitled to what's known as a reasonable royalty.
16 That's what we believe should be paid in this case: A
17 reasonable royalty.

18 Now, they're not going to ask you for a
19 reasonable royalty. They're not doing that. They're
20 going to ask you for this gigantic lost profits number.
21 But we think that the reasonable royalty is, as it
22 sounds, the reasonable approach and the right result in
23 this case.

24 So what's the reasonable royalty for this
25 case? To come up with that, we've hired a very

1 well-known damages expert, a man named Mike Wagner.
2 He's an accountant. He's a businessman. He's testified
3 in over a hundred patent trials. He's been in this
4 courtroom before.

5 And here's a summary of what he found: \$2
6 million. He says the reasonable royalty in this case
7 should be \$2 million.

8 Now, I'm not saying that's nothing. To
9 them, that's nothing. Two million is nothing when
10 you're asking for 280 million. But \$2 million for a
11 feature that no one has ever been shown to use; \$2
12 million for a feature that has never been cited by a
13 single customer as a reason to buy SAP software; \$2
14 million for a feature that is one of hundreds of
15 thousands of features in the software, that is very,
16 very reasonable indeed.

17 I look forward to presenting all the
18 evidence to you in the case as we go forward. The trial
19 is going to be pretty quick. We're going to bring
20 witnesses. We're going to bring documents to you.

21 We're going to show you that the story
22 that they've told is simply not supported by the facts
23 or the evidence and that they're seeking lost profits
24 that they never lost on sales that they never would have
25 made and money that they never would have made and it

1 had nothing to do with us. It was all to do with their
2 own internal issues.

3 At the end of the day, when all the
4 evidence is in, I'm going to get back up and talk to you
5 again. And I'm not going to ask you for a free pass.
6 I'm not going to ask you for a bargain. I'm not going
7 to ask you for a pat on the back.

8 All I'm going to ask you for is a
9 reasonable royalty based on the facts and the evidence
10 that you've heard. And I think that when you've heard
11 all that, you'll conclude that the reasonable royalty is
12 the way to go in this case, because that's what's
13 supported by the evidence.

14 Thank you for your time.

15 THE COURT: Who will be your first
16 witness?

17 MR. COLE: Your Honor, Plaintiff calls Tom
18 Carter.

19 THE COURT: All right. Mr. Carter, if
20 you'll stop right there and take the oath, please.

21 (Witness sworn.)

22 THE COURT: Thank you.

23 If you don't mind, try to speak into the
24 microphone and keep your voice up. It will be easier to
25 make a record, and try not to talk too quickly.

1 THE WITNESS: I'll try.

2 TOM CARTER, PLAINTIFFS' WITNESS, SWORN

3 DIRECT EXAMINATION

4 BY MR. COLE:

5 Q. Morning, Mr. Carter.

6 A. Good morning.

7 Q. Could you please introduce yourself.

8 A. Hello everyone. My name is Tom Carter.

9 Q. I think we've heard about this a lot, but are
10 you the inventor of the patent we're here on today?

11 A. Yes, I am.

12 Q. All right. I take it you worked at Trilogy?

13 A. Yes, I did.

14 Q. Can you tell us how you came to work at
15 Trilogy?

16 A. I was one of the founders of Trilogy. A couple
17 of friends and I started the company out of college. So
18 it was sort of the first real job we had, if you will.

19 Q. What made you want to start your own company
20 out of college rather than go work for Microsoft or SAP
21 or somebody else?

22 A. I guess I just kind of had that entrepreneurial
23 American spirit. I wanted to start my own company and
24 do my own thing.

25 Q. And when did you guys start Trilogy?

1 A. We started it in 1989.

2 Q. All right. Now, let me ask you this: What
3 kind of company is Trilogy? Just at a high level, what
4 does Trilogy do?

5 A. Trilogy sells business software. So not
6 software that you and I would purchase as individuals;
7 software to big companies to run their operations.

8 Q. All right. So like you or me might go down and
9 buy a copy of QuickBooks or something for \$79, is that
10 kind of the price level you're looking at in business
11 software?

12 A. No, I'm not.

13 Q. Can you give us an order of magnitude of what
14 does -- the kind of business software that Trilogy
15 sells, what does that sell for usually?

16 A. It -- I mean, business -- the business software
17 will sell, on the low end, for hundreds of thousand of
18 dollars to, on the high end, tens of millions of
19 dollars.

20 Q. Now, to kind of cut to the chase, I want to
21 fast-forward from when you guys started Trilogy in 1989
22 up to the mid-1990s. And what were you doing for
23 Trilogy in the mid-'90s?

24 A. In the mid-'90s, I was actually out selling to
25 our customers the software that we had at the time. So

1 I was flying around on planes, visiting customers,
2 sometimes two or three a week.

3 Q. Can you give us just a sense over however many
4 years you were doing that, two, three, four years, how
5 many companies did you meet with to talk about their
6 business software needs?

7 A. I easily met with a couple hundred customers.

8 Q. And are these -- what kind of companies are
9 they? Big, small?

10 A. Very, very big -- very big companies. The --
11 most of the ones I met with were all Fortune 500
12 companies.

13 Q. Okay. Now, most people probably know, but just
14 in case, can you tell us what the Fortune 500 is?

15 A. The Fortune 500 is the list of sort of the top
16 biggest 500 companies. So it's specifically the top
17 500.

18 Q. Okay. Can you just -- just to put a little
19 context, give us a few of the names of companies you met
20 with in the mid-90's when you were selling software.

21 A. Oh, I mean, many of the customer companies, you
22 would have heard -- I mean, IBM and Dell and Hewlett
23 Packard; automotive companies, like, you know, Ford and
24 Chevy and GM; and appliance companies, like Whirlpool;
25 insurance companies, you know, the Prudentials; American

1 Expresses. So, I mean, all the big names you would have
2 heard of in those industries.

3 Q. And I take it you were talking to the folks at
4 those big companies that buy business software; is that
5 fair?

6 A. Yes, that's correct.

7 Q. All right. Well, when you were talking to
8 these companies over the years, did you notice any
9 particular areas that they were having problems in?

10 A. Yes, I did.

11 Q. And tell us about that.

12 A. All these big companies were having problems
13 with their pricing. It's not necessarily that they
14 couldn't come up with a price, but sales reps, when they
15 were talking to customers -- you know, this sales rep's
16 talking to you, and, you know, you say: What's the
17 price? I'd like to buy.

18 And if the sales rep says: I'm sorry, I
19 have to go back to the central office, they would often
20 lose the deal. The competitor would come in with a
21 price and lose the deal.

22 And, you know, it was the era that laptops
23 were just starting, and sales reps really wanted to be
24 able to close the deals.

25 Q. So who cared most of these problems: The sales

1 reps, the sales force at the companies, or the IT
2 department or both?

3 A. The sales force was really the one that cared
4 about it. The technical staff thought their systems
5 were fine. It was the sales reps who would lose the
6 sales, and they were the ones talking to the customers,
7 and they were the ones that really cared.

8 Q. I think this is kind of common sense, but is --
9 is pricing -- is setting prices and being able to
10 execute prices, is that an important thing for companies
11 to do, or is that a relatively unimportant thing?

12 A. It's incredibly important.

13 Q. Okay. Well, in a little more technical detail,
14 can you tell us, what was it -- what was it about the
15 pricing systems that existed back in the mid-'90s that
16 was causing the problems; in other words, that prevented
17 them from putting something on a laptop and letting
18 their sales reps go out and close deals right on the
19 spot?

20 A. The old pricing systems would store each piece
21 of information in a different location. And the
22 computers then would have to go get each piece one at a
23 time. So --

24 Q. What kinds of information are you talking
25 about?

1 A. So information -- one piece of information
2 would be -- the list price in the United States would be
3 in one location versus the discount to gold customers
4 would be in another location or the discount for a
5 certain type of product would be in yet a different
6 locations.

7 So if you had to go get the list price and
8 one discount and another discount and another discount
9 and tax and shipping and something else, it was kind of
10 like if -- if I asked you to go into the kitchen, and I
11 said, go get a fork, and you came back, and I said, now
12 go get a spoon, or, you know, you were cooking, and I
13 said, go to the store and get this one ingredient, and
14 then you came back, and I said, oh, now I need you to
15 get another ingredient, and I kept sending you back and
16 forth to the store, that trip to the store can be very
17 expensive.

18 Q. Okay. And why were the systems at the time
19 organized so that you had to go and make a separate trip
20 to the store for each ingredient? Why did they do that?

21 A. That was just kind of the standard way people
22 did things. It seemed to make sense that you'd put
23 different things in different locations, but there were
24 consequences to that.

25 Q. Okay. Was -- let me ask you this: The people

1 you talked to, the business people at these big
2 companies, did they think about the pricing problem in
3 the same way that the systems were set up where you
4 would want to go get a different piece of information at
5 a different spot and then get it all one at a time and
6 bring it back?

7 A. No. Business people don't think about the
8 technical implementation or how the computer does it.
9 That's not how business people think.

10 Q. Okay. How did the business people think about
11 their pricing?

12 A. Business people thought about it with sort of a
13 common sense approach. They would say: To whom are you
14 selling? Who is the customer? They would say: What
15 are you selling? What is the product? And then just:
16 What is the price?

17 They didn't think about the details of the
18 separate locations, just who are you selling to, what
19 are you selling, and what is the price? Not what are
20 all the different pieces of it, and where are they
21 located?

22 Q. Now, did some ideas occur to you about how you
23 could improve upon the pricing systems that existed at
24 the time?

25 A. Yes.

1 Q. And just at a high level, what was your idea?

2 A. At a high level, my idea was to go get all the
3 different pieces of information at the same time.

4 So if you were going to, you know, cook a
5 recipe, when you go to the store, go get every possible
6 ingredient that you might need. You might even get an
7 ingredient you didn't need, but go get it all at once in
8 one trip rather than going for each piece one at a time.

9 Q. Okay. And is the way you organize your system,
10 is that the sort of same way that -- the old way -- the
11 old way of doing it where you would keep different
12 things in different places, or was yours -- how did
13 yours comport with the way businesses thought about
14 their pricing?

15 A. The -- my system stored the information much
16 more like the business people bought it. The business
17 people just thought about the price, so I put all of the
18 pieces of the pricing in one location so you could go
19 get it all at once.

20 Q. Okay. Now, in the '90s, when you were
21 talking -- traveling around the country talking to all
22 these big companies, did SAP have a pricing system at
23 the time?

24 A. Yes, it did.

25 Q. Okay. And was SAP's system the multiple trips

1 to the store, or was it more in line with yours?

2 A. It was the multiple trips to the store.

3 Q. Did you actually talk to customers who had and
4 used SAP's old system at the time?

5 A. Yes, I did.

6 Q. Okay. Can you give us a name or two of who was
7 doing that?

8 A. Hewlett Packard, IBM, Allegiance -- I mean,
9 there were a large number of customers.

10 Q. Okay. And were the problems you noticed in
11 pricing, were those focused on a subset of customers, or
12 did that seem to be a widespread problem?

13 A. It was absolutely widespread. It didn't matter
14 what you were selling, if your sales rep couldn't give a
15 price to the customer in a timely fashion, they would
16 lose the deal, and every sales rep hates that, no matter
17 what they sell.

18 Q. Okay. And just tell -- just kind of factually
19 a little bit, can you tell us how you took your -- the
20 idea that occurred to you to rearrange pricing, and what
21 did you do with it next?

22 A. As I mentioned, I was flying from customer to
23 customer, and so rather than reading a book or watching
24 a movie on the airplane, I used my own laptop, and I
25 actually developed the software to prove that my concept

1 would work. And then after developing it and proving it
2 would work, I filed for the patent.

3 Q. Okay. And you filed for the patent in -- when
4 was that, '96?

5 A. '96, yes.

6 Q. All right. And what was the product called
7 that you built?

8 A. The -- we originally called it PriceBuilder,
9 but you'll also hear it as Pricer or SC Pricer. The
10 marketing name has changed a little bit, but it was the
11 same core product.

12 Q. Okay. And you mentioned that you filed for the
13 patent in '96. When was your patent actually granted by
14 the Patent Office?

15 A. In 2003.

16 Q. They moved fast.

17 A. Yes.

18 Q. All right.

19 MR. COLE: Your Honor, may I approach?

20 THE COURT: Yes.

21 Q. (By Mr. Cole) I'm going to hand you Plaintiffs'
22 Exhibit 2 and just ask you to confirm, if you will, if
23 this is a copy of your patent.

24 A. Yes, that is it.

25 Q. If you could maybe just show -- show the jury

1 real briefly, so they can see what the kind of cover
2 looks like.

3 A. (Complies.)

4 Q. Thank you.

5 All right. Now, when you wrote the patent
6 and applied for the patent, did you write that on a
7 small part or a little aspect of your product, or did
8 you write it on the guts of the product?

9 A. No. I wrote it on the guts, covering pretty
10 much everything.

11 Q. Now, did your -- a technical question, did
12 your -- did your product -- did the Pricer products
13 embody the patent?

14 A. Yes, the Pricer products embodied the patent.

15 Q. All right. I'd like to talk to you a little
16 bit about what it was about your product that you felt
17 was better than the old solutions at the time.

18 Let's see if I've got my PowerPoint
19 working now. There we go.

20 Okay. And we put on the board here a list
21 of three advantages, and I think we talked about this
22 yesterday. If you could kind of take us through what
23 these advantages are and how -- how they were enabled by
24 your patented invention.

25 A. Okay. Speed being the first advantage, we've

1 talked about it a little bit. So I put all the
2 different pieces of the pricing information in a common
3 location so that the customers only had to make one trip
4 to the store, if you will, to get all of that
5 information back.

6 And, you know, those trips to the store
7 often take more time than it does to actually cook a
8 meal or calculate the price in many cases. The --

9 Q. And what -- that made them -- how much faster
10 did that make the system?

11 A. Oh, it made it a minimum of 10 times faster,
12 and in some cases, it was actually a hundred times
13 faster. So it wasn't just a little bit; it was
14 dramatic.

15 Q. And for the big companies -- you know, you
16 mentioned you'd have to go to the store one after the
17 other, one after the other. How much -- how many
18 different sort of places would the big companies have to
19 look to do pricing? I mean, how many trips were there?

20 A. The bigger companies would have to look in a
21 minimum of 30 to 50 places, because they had 30 to 50
22 different types of information in their pricing. And
23 that's at the low end. The average was probably closer
24 to a hundred.

25 And for many of those companies, there

1 were several hundred places that they had to go, sort of
2 trips to the store, which was how my system could easily
3 be a hundred times faster.

4 Q. So if they had to go to the store a hundred
5 times, with your invention, how many times would they
6 have to go?

7 A. Once.

8 Q. All right. Okay. Anything else about speed?

9 A. I think that covers it.

10 Q. Okay. All right. The next advantage here, it
11 says: Flexibility and maintenance. Can you tell us
12 what that is.

13 A. As we mentioned before, the business people
14 just think of, who is the customer? And they'll group
15 the customers, and they'll group them into a hierarchy.
16 So customers in the United States or customers in Texas.

17 And so my product would let the customers
18 think of it in just that term. So it made it easier for
19 the business people.

20 The customers would ask, what is the
21 product? And they would group that product and often
22 into a hierarchy. So you might have automobiles, with
23 cars or trucks. You might have electronics with
24 computers or software.

25 So my software would let them organize it

1 according to how they thought it -- thought about it.
2 So it was just a lot easier.

3 And then the pricing information they put
4 in one place, so they could go look for it and find it
5 in one place, and that also just made it easier instead
6 of having to go put it in a lot of different places.

7 Q. Let me ask you this: You mentioned the word
8 hierarchy. Did you -- did you invent hierarchies in
9 general?

10 A. No, absolutely not.

11 Q. So what was it about hierarchies in your
12 invention that was -- that was new and novel?

13 In other words, was it the fact that you
14 used them or the way you used them?

15 A. No. It was the way I used them in order to
16 do -- reduce those trips to the store.

17 Q. Okay. And we also talk here about maintenance.
18 What's -- what is that, and how was that maintenance a
19 benefit of your invention?

20 A. For the person who needs to enter the data, it
21 allowed them to -- they could either manually enter it,
22 or some of the technical people could write programs to
23 enter the data and it let them enter it in the format
24 that they thought about it as the business.

25 We didn't want them to have to change

1 their business to work with our software, so we allowed
2 them to do it the way they did it. It just made it a
3 lot easier for them.

4 Q. Okay. Well, let me ask you this: If you're
5 a -- if you're a big company and you're running one of
6 the old systems, like SAP's system, and you decide, we
7 want to create a new kind of pricing category; let's
8 group our customers into, you know, platinum, gold, and
9 silver or something like that, and you didn't have that
10 set up before, and you wanted to change your pricing
11 system to handle that, what would you have to do to
12 the -- to the guts of the software to implement that new
13 change?

14 A. As I mentioned, each piece of information was
15 stored in a different location. And so if a business
16 came up with a new type of information, a new type of
17 discount, they'd have to create a new location for it.

18 And creating that new location was not
19 something that the business people could usually do.
20 They'd need to get the technical software developers to
21 go add a new -- a new location that people would call a
22 database table, but it was a structural change.

23 So, I mean, it would be a -- more akin to
24 you having to add a whole new cupboard to your kitchen.
25 You couldn't just put information in a cupboard or

1 drawer that was there; you had to add a new one; you had
2 to remodel.

3 And people do it all the time, but it
4 requires skilled people to know what they're doing, and
5 it takes a little bit more time.

6 Q. And with your invention, would you have to
7 create a new cupboard if you wanted to add some dishes?

8 A. No. Because as I mentioned, I put all the
9 dishes in, you know, one location. I didn't need a
10 different location for each different type of
11 information.

12 Q. Okay. All right. Anything else on those two?

13 A. I think that covers them pretty well.

14 Q. All right. The last one we've heard a little
15 bit about already today. It runs on a laptop. I think
16 we've talked about that a little bit, but just -- if you
17 could tell us, what was it about the way you structured
18 data and the advantages that provided that enabled you
19 to run it on a laptop, other than just the fact that it
20 ran on a laptop?

21 A. Yeah. The -- the trips to the store is
22 probably the best way to think about it; that, you know,
23 if you have to make a lot of trips to the store, it's
24 going to be slower to begin with.

25 And laptops weren't as powerful, and so,

1 you know, if those trips to the store, you had to walk
2 to the store rather than taking your car, it was -- and
3 you had to do it a hundred times, it was going to be
4 even more slow.

5 So the performance helped a lot. And also
6 storing the information in one main location rather than
7 lots of locations, the laptop computer just didn't need
8 as much capacity and space because the information
9 wasn't stored all over the place.

10 Q. Well, let me ask you this: If you had -- could
11 you have taken, for example, SAP's old software that you
12 saw in the mid-'90s and just literally just jammed it on
13 to a laptop, and if you did that, would it work very
14 well?

15 A. It would not work very well.

16 Q. And why wouldn't it work well?

17 A. The number one reason is, it would be
18 incredibly slow.

19 Q. Okay. So it's not that you literally couldn't
20 do it; it was --

21 A. It was just impractical.

22 Q. Okay. Let's pick back up again about the
23 Pricer product that you created, and I want to talk a
24 little bit about it and how it sold in the marketplace.

25 When you built the product, first of all,

1 did it work?

2 A. Yes, it worked quite well.

3 Q. And how did -- how did the -- how was the
4 product received when you started selling it?

5 A. It was received incredibly well. The customers
6 and the consultants and everybody, I mean, they loved
7 it. They -- they saw that it worked.

8 Q. Okay. And when did you start actively selling
9 Pricer?

10 A. Late 1995.

11 Q. Okay. Let's -- let me ask you about a
12 couple of other -- we saw this in opening statement, and
13 I want to ask you about this real briefly.

14 This is Plaintiffs' Exhibit 425. It's a
15 USA Today article. Can you tell us about -- about this
16 article and what its significance is?

17 A. Yes. So, first of all, the person in the quote
18 there, Jack Maynard of the Aberdeen Group, he was a
19 consultant hired to evaluate things for big companies.

20 If you're familiar with Consumer Reports,
21 the same way they'll give you advice on how to buy a
22 dishwasher, Jack Aberdeen -- or Jack Maynard and the
23 Aberdeen Group were that equivalent for big businesses.

24 So when those people come out and say, you
25 are the Rolls-Royce of the industry, that's not just

1 something that someone at home reads. I mean, that is
2 the kind of thing that business people look for when
3 they go to buy their software. So it was a big -- very
4 big deal at the time.

5 Q. Great. All right. Let me look at another one.
6 And this is Plaintiffs' Exhibit 581. Can you tell us
7 what this is.

8 A. This is a report from the Gartner Group. You
9 can see that kind of, you know, written up top. It's
10 not very clear. But Gartner Group was another one of
11 these industry analysts. They were another
12 Consumer-Report-like service for the big companies who
13 evaluate software. They make recommendations for it.

14 Q. Okay. And what are they saying here about your
15 Pricer product?

16 A. So I guess the bottom part is the most telling.
17 It says they reviewed our product, and it says it was
18 the first product to provide the majority of features
19 that selling organizations require for pricing
20 configuration.

21 Q. Now, was that consistent with your experience,
22 being out in the marketplace, that your product was the
23 first one to provide the majority of features that
24 selling organizations needed?

25 A. Yes.

1 Q. All right. Now I want to talk a little bit
2 about how your product --

3 MR. COLE: Well, I'm sorry.

4 THE COURT: Mr. Cole, we'll pick up there.
5 Let's take our morning recess.

6 Ladies and Gentlemen, let's take 20
7 minutes. Be back ready to come in the courtroom at
8 10:30. Remember my prior instructions, and don't talk
9 about the case. Have a nice break.

10 LAW CLERK: All rise.

11 THE COURT: Y'all are excused into the
12 jury room then.

13 (Jury out.)

14 THE COURT: Please be seated.

15 Step down, Mr. Carter.

16 Y'all have an updated exhibit list that
17 reflects what's been admitted and what hasn't been
18 admitted?

19 MR. COLE: I think -- I think Ms. Lockhart
20 has that.

21 THE COURT: Okay. All right. I just
22 wanted to make sure we've gotten that. That reflects
23 everything that's been ruled on, correct?

24 MR. COLE: I believe so, Your Honor.

25 THE COURT: All right. Mr. Cole, can

1 y'all or Mr. Melsheimer have the jury notebooks a little
2 bit before 10:30?

3 MR. MELSHEIMER: I believe so, Your Honor.

4 THE COURT: All right.

5 MR. MELSHEIMER: Your Honor, may I ask a
6 question?

7 THE COURT: Yes.

8 MR. MELSHEIMER: I wonder if we might get
9 copies of the exhibits that he's going over with the
10 witness. It makes it hard for me to make -- to
11 understand what's happening when I haven't been given a
12 set of the exhibits.

13 I mean, we'll do that to them. I just
14 want to make sure we --

15 MR. COLE: Sure.

16 THE COURT: Okay.

17 MR. MELSHEIMER: Thank you.

18 THE COURT: All right. All right.

19 Court's in recess until 10:30.

20 LAW CLERK: All rise.

21 (Recess.)

22 LAW CLERK: All rise.

23 (Jury in.)

24 THE COURT: Please be seated.

25 Mr. Cole, before we get started again, I

1 believe that there were notebooks placed in each of the
2 seats for the members of the Jury. Let me give you some
3 brief instructions. Ah, there we go. I certainly don't
4 want to leave anyone out.

5 Let's take a minute and look at the patent
6 issued. It should be behind Tab 1 of the notebook.
7 Now, the cover page of the patent provides some
8 identifying information. It includes the date that the
9 patent issued, along with the patent number along the
10 top, the inventors' names, the bottom date, and a list
11 of the cited references considered by the PTO. You see
12 the references cited over in the left-hand side of the
13 first column -- left-hand column down about the middle
14 of the page, and there's a list of things that the PTO
15 considered.

16 Now, over on the right-hand side of the
17 page, there's a heading entitled abstract and under the
18 specification of the patent begins with the abstract and
19 it's also found on the cover page, and the abstract is a
20 brief statement about the subject matter of the
21 invention.

22 Next come the drawings, and you'll see
23 several drawings if you just want to quickly flip
24 through the first few pages of the patent. The drawings
25 illustrate various aspects or features of the invention.

1 notebook throughout the trial as you -- you need to.

2 Mr. Cole.

3 Q. (By Mr. Cole) Mr. Carter, let me ask you one
4 follow-up question from what the Court just went over.
5 I believe the Court mentioned a filing date and what was
6 the date of your invention -- the original filing date
7 where you claimed your invention? 1990 --

8 A. It was 19 -- middle of 1996 --

9 Q. Okay.

10 A. -- I believe. I don't remember the exact date.

11 Q. Okay. Thank you. All right. I -- I think we
12 were about to get into the subject of the sales of
13 Pricer in the -- the early time period and we have a
14 chart here, this is the one I was looking for in opening
15 and couldn't find, so now we found it.

16 Can you tell us, if you would, what this
17 chart is, just kind of maybe take us through what's
18 shown here?

19 A. The chart is showing all the individual sales
20 of my Pricer product. So in 1995, I mentioned we
21 started selling late in the year, and we had two sales.
22 So the -- the sort of the first dot is too high on the
23 chart and above the 1995, you can see the names of the
24 specific customers that we sold to that year.

25 Q. Okay.

1 A. So Hewlett Packard and Reynolds and Reynolds.

2 Q. Let me stop you there. Can you tell us about
3 the Hewlett Packard deal?

4 A. Hewlett Packard was already a customer of
5 Trilogy. They had purchased some other software from
6 us, and Hewlett Packard was also an SAP customer. So
7 they owned SAP, they owned Trilogy Software already when
8 we came out with the new product. Hewlett Packard is
9 also known for doing very thorough evaluations of
10 software that can take many months, but fortunately the
11 Pricer product was so unique and different at the time,
12 it didn't take as long as usual, So we were able to get
13 that sale still in 1995 shortly after we came out with
14 the product. And as I mentioned, they were already a
15 SAP customer and a Trilogy customer at that time.

16 Q. Okay. Now, let's move on to 1996. How many
17 sales of Pricer did you make in 1996?

18 A. We sold to 16 customers. You can see the dot
19 on the line is up at 16, and above the 1996 year is the
20 list of the names of the 16 customers to whom we sold
21 the Pricer product that year.

22 Q. Yeah. Are the 16 here, does that include the
23 ones you sold in '95 or are those brand-new customers?

24 A. Those are brand-new customers. So Hewlett --
25 Hewlett Packard, as an example, remained a customer in

1 1996. So in total we had 18 customers in total, but
2 those were just sixteen new customer -- brand-new
3 customers buying it that year.

4 Q. Okay. Now, let me ask you a couple of
5 specifics on -- in 1996. Some of these deals are bold
6 and you can see it's a little hard to tell, but some of
7 them are bold. What's the difference between the bold
8 and the -- the regular type?

9 A. The -- the bold customers were ones who bought
10 really only the Pricer product. Sometimes, as I
11 mentioned, Trilogy had other software, but the bold ones
12 only bought the Pricer product.

13 Q. Okay. And I see a couple of -- a couple of
14 questions about some of the bold ones, we're going to --
15 we're going to touch on some and other witnesses will
16 address other. So BMC, can you tell me why did BMC buy
17 Trilogy Software in 1996?

18 A. BMC was especially interested in the
19 flexibility for representing the software as they did.

20 Q. Let me ask you just broader, did they buy
21 because of Pricer or some of your other software?

22 A. Oh, I'm sorry, they bought because of the
23 Pricer product.

24 Q. Okay. And what was it at a high level about
25 Pricer that made BMC want to buy in 1996?

1 A. BM -- BMC wanted those new features that were
2 different that no one else had and Pricer had just come
3 out with.

4 Q. Okay. And were those new features covered by
5 your patent or some other part of your product?

6 A. They were covered by the patent.

7 Q. Okay. And the second one I'd like to ask you
8 about in 1996 is kind of down here in the middle,
9 Allegiance, Cardinal Health?

10 A. Yes.

11 Q. Why did they buy Trilogy Software in 1996?

12 A. I mean they also bought the software because, I
13 mean, they saw the differences that, again, only the
14 Pricer product had. Allegiance also owned SAP at that
15 time, and so they saw the difference, they saw the value
16 and they paid us for that.

17 Q. Okay. And Allegiance, they're a healthcare
18 company?

19 A. Yes.

20 Q. And what is BMC?

21 A. BMC is a software company.

22 Q. All right. Let's move to 1997. How many new
23 customers did you get in 1997?

24 A. 1997, we had 18 new customers.

25 Q. All right. And let me ask you about a couple

1 of the specifics here. Towards the middle there you can
2 see Whirlpool?

3 A. Yes.

4 Q. Why did Whirlpool buy Trilogy Software in '97?

5 A. Whirlpool also bought Trilogy and the Pricer
6 product. Again, because of the differences in the
7 product that it had that no one else had, the -- the
8 advantages, like we talked about before that were
9 covered in the patent of the speed and performance of it
10 as well as the flexibility of the software.

11 Q. Okay. And the next one in '97, I need to ask
12 you about is Bridgestone; why did Bridgestone buy
13 Trilogy?

14 A. Again, the similar story they were, again, also
15 an SAP customer already, and the SAP system wasn't doing
16 some of what they needed. This -- my new product was
17 different. It had new features that no one else did and
18 they bought it for those features.

19 Q. Okay. And for BMC, Allegiance, Whirlpool and
20 Bridgestone, were all of those Pricer led or Pricer only
21 deals as opposed to concluding other valuable Trilogy
22 Software?

23 A. Yes, they were -- they were Pricer led. I
24 think I may have overstated it before that it was only
25 Pricer. There were other pieces of software needed to

1 deploy it, but it was absolutely for the value of
2 Pricer.

3 Q. That's why they bought it?

4 A. Yes.

5 Q. All right. All right. '98. Let's do that one
6 real quick. How many new customers did you have in '98?

7 A. I believe it was 25, yeah, so the dot on the
8 chart on the line is up at the 25 and then above 1998 it
9 lists the names of the customers we sold and, again,
10 those were only new -- those were new customers.

11 Q. Okay. And again, I've got to ask you about a
12 few of them, specifically Goodyear; was that at a Pricer
13 led deal?

14 A. Yes.

15 Q. And what -- what was it about Pricer that made
16 Goodyear buy?

17 A. Again, it was the -- the features that were new
18 and different. Goodyear also already owned SAP at the
19 time they bought our product, so they were buying it for
20 the things that were new and different that SAP and no
21 one else had done.

22 Q. And were those covered by your patent?

23 A. And those items were covered by the patent.

24 Q. Okay. Now, would it be fair, in your view, to
25 attribute all the money Goodyear paid in that deal to

1 Pricer as opposed to anything else?

2 A. Yes, absolutely.

3 Q. All right. Two more specific ones I need to
4 ask you about. In 1998, E.&J. Gallo, who is that?

5 A. E.&J. Gallo is the wine company, makes the
6 Gallo wines.

7 Q. Okay. And why did that buy Trilogy in 98?

8 A. They, too, needed the capabilities of Pricer
9 that only Pricer provided at that point.

10 Q. Okay. And were those covered by your patent?

11 A. And those items were covered by the patent.

12 Q. Okay. Last one, Michelin here in the middle in
13 1998, why did they buy Trilogy?

14 A. Yes, Michelin is the tire manufacturer, and
15 much like Goodyear, they needed the capabilities that
16 were new in Pricer that no one else had and were part of
17 what I put in the patent.

18 Q. Okay. Now, I want to ask you briefly, let's --
19 let's use this as a -- as a timeline, I want to ask you
20 about one of the documents Mr. Melsheimer showed in
21 opening statement that you wrote. Now, before we get
22 there, what do you see -- this red line you see in the
23 end of '98, what's that?

24 A. That is when SAP introduced the hierarchical
25 access into their system.

1 Q. Okay. And did you know at the time that they
2 had taken your technology and put it into hierarchical
3 access?

4 A. No, of course not.

5 Q. All right.

6 MR. COLE: And Mr. Diaz, if we could put
7 up DX885, I believe that was the one we looked at
8 earlier. Just give us one second. And if you could
9 blow up kind of the first paragraph, that's one, and
10 the --

11 Q. (By Mr. Cole) You can see in the back there,
12 what's the date?

13 A. I see December 16th, 1998.

14 Q. Okay. Is that before or after hierarchical
15 access came out?

16 A. That was after hierarchical access came out.

17 Q. All right. Let's talk about what you say in
18 here. Can you -- this is the -- we have absolutely
19 screwed up, I have absolutely screwed up section?

20 A. Yes.

21 Q. I think the suggestion was that there was
22 something fundamental about Pricer that had -- that you
23 had messed up or your team had messed up, was -- is that
24 what this document is about?

25 A. No, that was not about the core product.

1 Q. Okay. Can you tell me, what was it that was
2 screwed up here in December of '98?

3 A. It was discussing the integration between
4 Trilogy Software and SAP. When our customers owned SAP
5 and owned Trilogy Software, if they were in the SAP
6 software and they wanted to get a price, they had to
7 call into our system to do it, so we had to do an
8 integration that would call between them. And SAP kind
9 of made that as difficult as possible and didn't help us
10 at all, certainly, so we needed to do it all ourselves,
11 which required a lot of knowledge of the SAP system and
12 a lot of work. And every time SAP changed their system,
13 it broke our integration.

14 So the start of that e-mail thread was
15 actually me as a manager kind of yelling at the
16 developers like, hey, could you do a little better and
17 make this a little more robust. They were saying, well,
18 hey you as the manager, you didn't tell us this was so
19 hard or so critical. And I'm not a manager to yell at
20 people, not accept responsibility and I was saying, yes,
21 you're right. I mean, I should have seen more of this.
22 I should have put more emphasis on it. I was still, you
23 know, technical I could have written more code.

24 Yeah, it was harder than any of us
25 expected to actually do the integration. But it was not

1 the core product; it was how to actually talk to SAP's
2 system.

3 MR. COLE: Mr. Diaz, if we can go back to
4 the chart we were on.

5 Q. (By Mr. Cole) Okay. All right. Let's just
6 finish out the charts here. Can you tell me what
7 happened to your sales after the red line in '99 through
8 '03, just real briefly?

9 A. Well, they started to drop quickly. We thought
10 it was going to continue going up, but it dropped. So
11 in 1999, you can see the dot on the line showed we only
12 got seven customers, I believe, that year and it lists
13 those that are the new ones that we had that year.

14 Q. How was the market for technology sales in
15 1999?

16 A. It was still very good.

17 Q. Okay.

18 A. It was excellent.

19 Q. 2000?

20 A. 2000, it was still good. Things were, you
21 know, starting to maybe slow down because of that whole
22 dot com era thing, but this was -- I mean, this was
23 business software to help the sales rep sell, so people
24 were still buying that. And as they mentioned before,
25 the whole Year 2K thing, businesses were all buying

1 software to help themselves at that point.

2 Q. Okay. All right. Well, let me ask you just
3 at a high level, how important was your patented
4 invention to the sales of Pricer?

5 A. It was absolutely critical. If we didn't have
6 those capabilities, I mean, people didn't -- wouldn't
7 have had a great reason to buy it from us.

8 Q. Okay. And if you see on the chart, again, the
9 bold -- the bold Pricer led customers, did you have any
10 Pricer led sales after SAP introduced hierarchical
11 access?

12 A. No, we did not.

13 Q. Okay. And how many did you have before?

14 A. Before --

15 Q. Before '90 -- before October '98? I'm not
16 asking you to count, about 20?

17 A. Yeah, about 20.

18 Q. Okay. Now, I want to show you a little
19 different version of this chart. This one just kind of
20 highlights in blue the bold, I probably should have used
21 that one to start, it's a little clearer, but I want to
22 show you a different cut at the data here. Now, we're
23 going to turn eight of those customers purple. What
24 does -- what does the purple represent?

25 A. I believe the purple customers are those who

1 already had SAP at the time that they purchased our
2 software.

3 Q. And was there a market for bolt-on software for
4 pricing for SAP? In other words, better additional
5 software on top of a customer already running SAP's ERP
6 system?

7 A. Yes, that is exactly what we were doing was,
8 you know, offering a better mousetrap on top of what
9 they had and those are customers who were in exactly
10 that situation.

11 Q. And was there a bolt-on market in SAP all the
12 way to 2006 when you left?

13 A. Yes.

14 Q. Okay. Now, so what's the significance of the
15 fact that at one -- these purple customers, Allegiance,
16 Norand, Whirlpool, Bridgestone, Raychem, Goodyear, Bay
17 Networks and Axo, what's the significance of the fact
18 that they bought Pricer even though they already had
19 SAP?

20 A. Since they already had SAP, if SAP's system did
21 what they need or did -- did what they needed or even a
22 portion of it, they could use SAP's system for that. So
23 if they were going to pay us any amount of money in
24 addition to SAP, it was just for the capabilities that
25 we offered above and beyond SAP.

1 Intuitively I think that makes sense.
2 They already had the SAP. If they were going to pay us
3 a certain amount, it's because our software provided
4 value that was at least as great to them if not much
5 more valuable than what they were paying us.

6 Q. Now, let's talk about how much money these
7 purple customers were paying. So I've broken out over
8 here on the right side of the chart all eight of those
9 customers with a column that says license revenue and
10 what is that, just briefly?

11 A. That is the core purchase price for the
12 software. There was additional money that they might
13 give us, but just for Pricer itself, you know, to buy
14 it, to have the right to use it, that is what they paid
15 us.

16 Q. Okay. And the total for these eight customers
17 is how much?

18 A. \$12,152,000.

19 Q. Okay. And how much did Mr. Melsheimer say that
20 the reasonable damages are for their infringement?

21 A. I think they said two or three million dollars.

22 Q. Okay. And did you sell to more than just eight
23 customers in -- before October of '98?

24 A. Yes. Obviously we sold to far more than eight
25 customers. Those were just the eight where it's

1 absolutely clear that they already owned SAP and so
2 every dollar they were paying was obviously for
3 capability and value that was above and beyond whatever
4 SAP's system had at that time.

5 Q. Okay. Now, let me ask you this: In addition
6 to the license revenue, the basic license revenue, did
7 Trilogy also earn other money once it wins a customer
8 like that?

9 A. Yes, we do.

10 Q. Okay. What -- what other kinds of money do
11 you -- do you earn typically once you win a customer?

12 A. There are two main buckets of money that we
13 would also get. The first bucket is for consulting
14 implementation, helping the customer install the
15 software. If they're an SAP customer, to help them
16 integrate it to SAP. So it's sort of as a consultant we
17 would send people to the customer who would work with
18 them to actually get the software up and running.

19 Q. Okay. And about how much over the life of your
20 relationship with a customer would you earn in
21 consulting as compared to the -- the license only?

22 A. Right. Obviously some customers need more
23 help, some need less, but on average, the figure we use
24 is over the lifetime it would work out to be roughly the
25 same amount as what the customer paid in license, we

1 would usually get in consulting revenue over the course
2 of however many years.

3 Q. Okay. So just to use that example here, if
4 it's 12 million in license, another 12 million in
5 consulting?

6 A. Yes, that's correct.

7 Q. Total of 24?

8 A. Correct.

9 Q. All right. What's the third type of revenue
10 that you would earn once you were able to win a
11 customer?

12 A. So the third type of money is what was referred
13 to as maintenance or maintenance and support, which was
14 somewhat of an industry standard that a customer would
15 pay 18 percent per year and what that would cover was
16 all the development efforts for new features, for bug
17 fixes, to update the software, you know, as the
18 operating system changed. So to -- you know, they
19 essentially get those, you know, all those new bits of
20 work we would do are included in that 18 percent per
21 year.

22 Q. Okay. Now, and about how much -- how often --
23 or scratch that, sorry.

24 About how long would a typical customer, I
25 know it varies, but just on average would a customer pay

1 maintenance once you had won them over?

2 A. They would pay for as long as they used the
3 software and on average that was probably six to eight
4 years. Some customers would obviously use it much
5 longer, some less. Probably about six to eight.

6 Q. Okay. Does that add up to about the same
7 amount as the license fee, too?

8 A. Yeah. Once again, it's just -- it's a rough
9 figure, but usually over the course of the six to eight
10 or however many years we'd make the -- you know, the
11 same amount of what the license was originally, we'd
12 make about that much more over the course of those
13 years.

14 Q. Okay. So if you added all those three together
15 for just these eight customers, just these eight, how
16 much total revenue would you have earned?

17 A. So it would be about three times the figure
18 that's up there, so it would be about 36 million
19 dollars.

20 Q. Now, Mr. Melsheimer made a passing reference in
21 opening that -- that all the customers you had here, all
22 these people who bought Pricer, they were all early
23 adopters and so you really can't infer much about the
24 demand for Pricer; would you agree with that
25 characterization?

1 A. No, I completely disagree, actually.

2 Q. Now, he also said that if Pricer was such a
3 greater product, why didn't you go out after October '98
4 and rather than selling to SAP customers, go out to sell
5 the Oracle customers or people that -- that don't have
6 SAP at all; why -- why didn't you do that?

7 A. Well, we didn't really know what was going
8 wrong. I mean, we certainly tried to figure it out and
9 as you saw in the e-mail before, I thought maybe I
10 didn't work hard enough, maybe I didn't push hard
11 enough. So I didn't know that our sales problem was
12 necessarily related to SAP versus someone else.

13 So we were worried that, you know, we --
14 we might not be able to sell to anyone, and so we
15 focused our efforts on other things where we thought we
16 would make more money at that point. So at the core, we
17 didn't know what -- what the real cause was. So if
18 sales just aren't working, you, you know, you're not
19 going to beat a dead horse. You'll just, you know, try
20 and make money the best way you can.

21 Q. Okay. And let me ask you this: Were you --
22 did you stop trying to sell Pricer in '99, 2000?

23 A. No, we definitely didn't stop. It just -- it
24 changed from being the -- the focus, I mean in, you
25 know, '97 and '98, it was this was the great thing. So

1 we still had it. We still sold it. But obviously our
2 sales reps would sell, you know, what they thought was
3 most likely to sell. So the focus just shifted to other
4 things.

5 Q. And in terms of the value of your invention and
6 your product, was it a -- typically a better fit for the
7 big kind of Fortune 500 companies, like the Goodyears
8 and Whirlpools and people like that or to small
9 businesses?

10 A. I mean, it -- it was applicable to everyone.
11 As I said, if a sales rep couldn't give a price to the
12 customer, it doesn't matter whether it's a big company
13 or a small company. Now -- now, big companies have more
14 complexity, but the problem that we were solving getting
15 an accurate price to the customer was something
16 everybody had.

17 Q. Well, let me ask it this way, in terms of
18 priorities and -- and like the sweet spot for your --
19 for your product and your invention, was it larger
20 companies or smaller?

21 A. The sweet spot was certainly larger companies.

22 Q. Okay.

23 A. I mean, they're larger they feel more pain,
24 they sell more product, so that was the sweet spot.

25 Q. And in -- in the -- in the -- this time period

1 here, late '90s, early 2000s, did you have a sense for
2 of the Fortune 500 type, the sweet spot customers, how
3 many of those had -- were running the SAP ERP back
4 office system, just percentage-wise?

5 A. Oh, SAP was dominant. It was a majority. I
6 don't know an exact figure. I mean, more than half.

7 Q. All right. Now, after SAP introduced
8 hierarchical access, was price -- did Pricer lead
9 anymore deals for you after that?

10 A. No, it did not.

11 Q. All right. Now, we talked a little bit about
12 Pricer leading deals and I think you mentioned Trilogy
13 had other business software that was -- was also
14 valuable. Besides Pricer, what other products were
15 capable of leading deals for Trilogy back in this time
16 frame?

17 A. When Pricer first came out, there was really
18 only one other product we had that would lead deals,
19 that was our configuration software and that was kind of
20 what Trilogy was originally known for. Pricer became
21 the second product we had that led deals. Later on we
22 also had a product that calculated sales rep
23 commissions, we called it the commission product, and so
24 that also became one that would lead deals.

25 Q. Okay. And I want to ask you about a few

1 products that were sold, I think, in connection with
2 some of these others in -- in support and -- and real
3 briefly just ask you whether customers would pay Trilogy
4 the money they did because of these other ancillary
5 products, I'll just list them out quickly and I'll try
6 to get them fast. A product called Trilogy Backbone?

7 A. No, no -- no one would buy it because of that.

8 Q. They bought it to -- to what, to help --

9 A. The Backbone --

10 Q. -- the others work?

11 A. Yes. They buy it to help other things work.

12 It was -- it was glue. It was packaging.

13 Q. Okay. And I think it was also called MCC
14 Platform at one point?

15 A. Yes, we also called it MCC Platform.

16 Q. Okay. What about the Quote product you had?

17 A. Quote was a display mechanism. So once you
18 calculated the price, you just needed to put it up on
19 the screen. There's lots of different ways to put it on
20 the screen. You can -- you can display it in the screen
21 in SAP or something else. Quote was a way we had to do
22 it. That certainly didn't -- you know, nobody bought it
23 for that.

24 Q. Okay. Did people pay you a bunch of extra
25 money because your Quote product was really good?

1 A. No, not when selling pricing.

2 Q. So if you had a deal that had Pricer and Quote
3 together, how would you determine what they're paying
4 the money for?

5 A. I believe they were paying everything for
6 pricing, and I mean, if they didn't want to use the
7 quoting, they could do it themselves another way.

8 Q. All right. So with that same concept in mind,
9 let me take off a few more. SC Proposal?

10 A. SC Proposal would take the pricing and put it
11 into a Microsoft Word document, just make it a little
12 bit easier. Again, nobody -- no one bought the Pricer
13 product because we could put it in Microsoft Word.

14 Q. So same as Quote?

15 A. Same as Quote.

16 Q. SC Order?

17 A. SC Order was a bit more technical. It would
18 just -- it would run on a server and listen for pricing
19 request. It was -- you know, in the end people just
20 wanted to get the price. It was another way to give it
21 to them. Rather than giving it on the screen, you could
22 give it electronically through a server.

23 Q. If somebody bought Pricer and SC Order
24 together, how would you allocate the -- the value in
25 that contract?

1 A. I would -- I would allocate it all to Pricer.

2 Q. Okay. Is that consistent with your factual
3 experience when you were actually out there making
4 sales?

5 A. Yes. In fact, in many of the sales calls, I
6 mean the -- the discussions were all about Pricer. It
7 was all about the value of Pricer.

8 Q. Okay.

9 A. And only at the very end, well, how do we
10 display it? We'd discuss a couple ways and maybe they'd
11 use one of those products.

12 Q. Okay. SC Contract?

13 A. SC Contract was, again, another one that would
14 take paragraphs of text, contract text, and put it in a
15 Word document.

16 Q. Did anybody buy because of that?

17 A. No. They didn't buy the pricing product
18 because of that.

19 Q. Did they pay more money because of that in your
20 Pricer deals?

21 A. No. In the negotiation the price was all about
22 Pricer.

23 Q. Okay. And let me ask you about a series --
24 there's a series of products that I think were kind
25 of -- went with Pricer as kind of a package and if you

1 could just confirm whether that's correct. SC Pricer
2 Maintenance?

3 A. Yes, the Maintenance product was just where
4 somebody would type values into the screen.

5 Q. Price Book?

6 A. Correct. Price Book was another thing that
7 would take the prices and put it into Microsoft with
8 some nice formatting.

9 Q. Would either of those two things work without
10 Pricer?

11 A. No. In fact, they'd be completely worthless
12 without Pricer.

13 Q. And did -- did people buy Pricer because of
14 Price Book or did they buy Price Book because of Pricer?

15 A. No, they got the Price Book because of Pricer.

16 Q. And the same thing with the SC Pricer
17 Maintenance?

18 A. Yes.

19 Q. All right. And then a product called Pricing
20 Analysis?

21 A. Yes, again, it's the same thing. The Pricing
22 Analysis would look at the prices and report on it, but
23 if you didn't have Pricer, it was -- it was worthless.

24 Q. Okay. And Price Server, SC Price Server?

25 A. Yes, that was another mechanism to communicate

1 or get access to the prices electronically.

2 Q. All right. I've got two more and then we'll be
3 done with this. I'm sorry, it's a little tedious. A
4 product called Replication or Replicator?

5 A. Correct. So the Replicator would take pricing
6 data from the central server and help the sales reps get
7 it on a laptop. And again, they weren't -- no one would
8 buy our Replicator to take someone else's pricing to run
9 on a laptop, especially if it didn't run on a laptop.
10 So it was -- they would buy our software, Pricer, to run
11 on a laptop and this would just help get the information
12 out.

13 Q. And the last one is a product called Report or
14 Reporter, what about that one?

15 A. Again, similar thing, would report on the
16 pricing information that the engine came up with.

17 Q. Now, for any of these products we just went
18 over, did people pay you extra money in your Pricer
19 deals because of those ancillary products?

20 A. No.

21 Q. Okay. All right. Let's -- We're done with
22 that.

23 Let me ask you a couple more questions
24 about this. Back in the '95, '98 time frame before
25 things started going down, what was your sense of the --

1 the sort of medium term and long-term market potential
2 for Pricer?

3 A. I used to say, I mean, we believe because we
4 were selling these Fortune 500 companies that were
5 paying millions of dollars for it, that we believed it
6 was a billion dollar industry in total just over the
7 course of the lifetime.

8 Q. Would you consider pricing a niche market?

9 A. Not at all. Every company prices, every -- and
10 every company will lose if they don't have the right
11 prices and they can't get it to the customers. That's
12 not a niche.

13 Q. All right. And can you tell me what was the
14 reaction just for you personally and at Trilogy when,
15 you know, we got to '99 -- '98, '99, and things started
16 slowing down and then falling off, what was the
17 reaction?

18 A. I was very hurt, frustrated. I mean, it was my
19 product that we expected to, as I said, we thought it
20 could be a billion dollar market and it seemed to be
21 going away. So there was a lot of frustration.

22 Q. Okay. Now, did you blame hierarchical access
23 at the time? Did you say it's all because of
24 hierarchical access?

25 A. No, I didn't know about the hierarchical

1 access.

2 Q. Okay. Well, let me ask you why that was. Can
3 you tell me, did SAP launch a product, a stand-alone
4 product, that says we now have hierarchical access, it's
5 for sale, the cost is however many dollars? Did they do
6 it that way?

7 A. No. I mean, as they said, they had, you know,
8 thousands of features and other things, and this just
9 became one more. They -- they didn't even charge
10 anything for it. So the customers that had it,
11 basically would just, you know, get it for free. There
12 was no fanfare in that respect. So I just didn't know
13 about it.

14 Q. How --

15 A. I mean, it was bundled in with everything else.
16 As I said, they had everything else and they bundled it
17 in with that.

18 Q. How easy is it when you're trying to sell
19 software to compete with somebody selling the same thing
20 you have or something very similar to what you have for
21 free?

22 A. It's -- when a big company gives it away for
23 free, it's almost impossible. If -- if they have the
24 same thing you have, it's almost impossible.

25 Q. And let's look here, if we can, at a document

1 that touches on that point. This is Plaintiffs' Exhibit
2 270, and I know you didn't see this at the time because
3 this is an internal SAP e-mail in June of '98. There is
4 one guy, I think, on there that you know. Do you see
5 the name Bernhard Neumann?

6 A. Yes, I knew Dr. Bernhard Neumann.

7 Q. He was an SAP engineer?

8 A. Yes, he was one of their best that actually, I
9 mean, ran a group for them.

10 Q. Okay. And here can you tell us what this is
11 talking about and what -- how -- how significant is this
12 in terms of the, you know, bundling concept you just
13 mentioned? What is this -- what is this saying?

14 MR. MELSHEIMER: I'm going to object, Your
15 Honor, he just told this witness it was an internal SAP
16 document. He's asking him to interpret what it means.
17 So I object, lack of foundation.

18 THE COURT: Well, you can explain what it
19 means to you.

20 THE WITNESS: Okay.

21 THE COURT: Okay.

22 A. So it says they are bundling these three
23 products and the SPE stood for their sales pricing
24 engine. So they were going to bundle them together to
25 discourage the usage of third-party components and then

1 they list Trilogy by name. So to me this means that
2 they are including their new pricing with some other
3 things specifically to hurt me.

4 Q. (By Mr. Cole) Okay. All right. I want to
5 talk about a couple more things that Mr. Melsheimer
6 mentioned in opening. I think he said something to the
7 effect that there's lots of other pricing companies out
8 there and, you know, nothing about them changed and so
9 you can't blame us for the drop in sales. So I want to
10 ask you about some of the alternatives, the other
11 pricing systems that were available back in the late
12 '90s up until you left in 2006, okay?

13 A. Okay.

14 Q. All right. Now, how about Oracle, did they
15 have a pricing -- did they have pricing functionality?

16 A. Yes, they did.

17 Q. Now, would Oracle be a commercially viable
18 alternative to a -- to a large SAP customer who wants
19 enhanced pricing on top of SAP?

20 A. No. Oracle was SAP's biggest competitor, so of
21 course, Oracle wasn't going to just take a piece of
22 their software and run it on SAP and SAP wouldn't really
23 allow it. They're head-to-head competitors. So to buy
24 Oracle software, a piece of it, to run on top of SAP
25 it's just -- it's impractical. It's not going to

1 happen?

2 Q. Did you ever see it happen?

3 A. I certainly never saw it happen.

4 Q. Okay.

5 A. I never saw anybody even think about it.

6 Q. All right. Next one -- let me see if I can
7 group these two -- these together. PeopleSoft, JD
8 Edwards and Baan, were those also ERP companies?

9 A. Yes, also ERP vendors just like SAP and Oracle.

10 Q. Okay. And --

11 A. PeopleSoft did human resources, so it was
12 slightly different.

13 Q. Would -- would you -- would it ever be a viable
14 commercial alternative to a SA -- large SAP customer who
15 needs enhanced pricing to bolt on PeopleSoft or JD
16 Edwards or Baan Pricing?

17 A. No, it would be impractical because they were
18 competitors, as I mentioned, and actually a couple of
19 those companies later got bought by Oracle, so they --
20 they became SAP's number -- they joined up and bought
21 each other to become the number one competitor.

22 Q. So PeopleSoft was bought by Oracle in 2004?

23 A. Correct.

24 Q. And JD Edwards around the same time?

25 A. Yes. I don't remember the exact year.

1 Q. Okay. All right. I've got, just to warn
2 everyone, I've probably got five or six more; we'll try
3 to get through them quickly, though.

4 What about a company called Siebel?

5 A. Yeah, Siebel is -- started as an opportunity
6 management company, helping sales reps just keep track
7 of the list of names of customers and gained -- I mean,
8 they -- in fact, actually Siebel later talked to Trilogy
9 about buying our pricing product to be able to use
10 because they -- they didn't have anything originally,
11 and then when they did have something, it wasn't very
12 good, and so they actually looked to buy ours at one
13 point.

14 Q. Was Siebel a viable commercial alternative to
15 meet the -- the pricing needs of SAP's large customers
16 back in the time you were at Trilogy?

17 A. No.

18 Q. Okay. And, in fact, I think Siebel was bought
19 by Oracle, too?

20 A. And Siebel became an Oracle company. So in
21 addition to not having the technical capabilities, they
22 then became competitors, which nobody would use them for
23 it.

24 Q. Okay. Next company I would want to ask you
25 about is i2. Would -- would i -- would i2's pricing

1 software be a viable commercial alternative to bolt on
2 top of SAP for big customers?

3 A. No.

4 Q. And why not?

5 A. i2 was a supplying chain vendor. They -- so
6 originally they didn't even have pricing for the longest
7 time. They then created a small module which they used
8 as their own stand alone, but to the best of my
9 knowledge, they were not selling it as an add-on or
10 bolt-on to SAP.

11 Q. Okay. Next one is a company with a funny name
12 called Blue Martini --

13 A. Yes.

14 Q. -- what about them?

15 A. Again, no, I don't believe that they were a
16 viable bolt-on to SAP. They added some pricing
17 functionality into their product management system, but
18 that was not really what they were using, and if
19 anything, they would sometimes call back to SAP to get
20 SAP's pricing using SAP's.

21 Q. Okay. Four more. Click Commerce?

22 A. Click Commerce was a smaller company, as I
23 recall they worked mostly on Microsoft systems and
24 software. I never saw them integrate to the ERP
25 vendors, do anything bolt-on-wise.

1 Q. Including SAP?

2 A. Including SAP.

3 Q. Okay. Company called Comergerent?

4 A. Comergerent. Yes. Comergerent, did -- they did do
5 bolt-ons, but as I recall, Comergerent was more of an
6 auction software vendor. So in that case, and when it's
7 auction software, you can imagine an auctioneer getting
8 up, they give you an initial price, but then everybody
9 bids on it and so that's not actually the final price.
10 So it -- it was different than what we were doing and
11 actually setting the real prices with the real discounts
12 for the end consumer to buy at that point.

13 Q. Would Comergerent been a replacement or
14 substitute for your invention?

15 A. No, I don't believe so.

16 Q. All right. Two more. Chrome, how about them?

17 A. Chrome was a data provider in the automotive
18 industry. So in the automotive industry when people
19 wanted to know what the MSRP price was and hopefully if
20 you buy a car, you know that you generally don't want to
21 pay MSRP price. So Chrome would provide that data. In
22 fact, Trilogy worked with Chrome quite a bit in the
23 automotive industry, because many of those customers
24 like Ford were automotive customers and we would work
25 with Chrome. They would feed us a piece of information

1 which we would then use in the ultimate calculation. So
2 I don't believe they were a viable bolt-on to SAP.

3 Q. Okay. Mercifully the last other competitor,
4 salesforce.com, would they have been a -- would they
5 have been a viable alternative, commercial alternative
6 for SAP big customers' pricing needs when you were at
7 Trilogy?

8 A. No, I don't believe so, and to the best of my
9 knowledge, I don't believe salesforce.com even has a
10 pricing system of their own. I believe they use -- I
11 mean, they let other people add in their own pricing
12 systems.

13 Q. Okay. Now, just in summary, any of the
14 companies we just went over, did any of their pricing
15 products offer the benefits of your invention in the
16 pricing field?

17 A. No, absolutely not.

18 Q. And that was true throughout the time period
19 you were at Trilogy up to 2006?

20 A. Yeah. To the best of my knowledge, I never saw
21 any of them have any of those capabilities we had.

22 Q. Okay. And I want to show you one more internal
23 SAP document, again, I won't ask you to --

24 MR. COLE: Well, can we have PX, excuse
25 me, 2105, Mr. Diaz?

1 Q. (By Mr. Cole) This, again, I won't ask you
2 your own -- to interpret it -- what they were meaning,
3 but I want to see if it's consistent with your
4 understanding of the market.

5 MR. COLE: And if you could look,
6 Mr. Diaz, at the -- the paragraph starting with the main
7 reason.

8 Q. (By Mr. Cole) This is a 2000 -- November 2003
9 SAP internal e-mail that says basically the important
10 point is: All pricing and configuration providers worth
11 mentioning have disappeared from the market by 2003 all
12 together or they have been marginalized, specifically
13 Trilogy, or taken over by one of the large application
14 suite providers, Oracle, Siebel, PeopleSoft. Is that
15 consistent with what you saw in the market in 2003?

16 A. Yes, it is.

17 Q. Has the disappearance of pricing configuration
18 vendors gotten -- have they reappeared since then or has
19 the disappearance of the small companies continued?

20 A. It's continued and it's small companies and
21 large because, in fact, this is mentioning PeopleSoft
22 and Siebel acquiring other companies who, in turn, then,
23 were acquired by Oracle. So even big companies it's
24 happening to.

25 Q. Now, is it consistent with your experience as

1 of 2003 that Trilogy had been marginalized?

2 A. Yes.

3 Q. Okay. Mr. Carter, this is the last topic, and
4 then I will leave you alone. I want to talk briefly
5 about your thoughts at the time you came out with Pricer
6 about the best way to market; in other words, the best
7 fit for your invention. Can you tell me what your
8 thought was on that?

9 A. My thought for the best way to bring the
10 product to market, since it was new and it had
11 capabilities that nobody else had, was to actually
12 partner with SAP, who was the big company in the back
13 office. So my -- I thought the best way was to partner
14 with them.

15 Q. And what did do you to pursue that?

16 A. I reached out to a person named Dr. Bernhard
17 Neumann, whose name we've seen before. He was an
18 incredible engineer for SAP, high up, ran a development
19 team for them and I had a huge amount of respect for him
20 personally and professionally. So I reached out to him
21 to say, hey, you know, we have this new thing, I think
22 it could be good for everybody. Let's do a partnership.

23 Q. And when was the first time you brought up a
24 possible partnership with SAP?

25 A. Sometime in 1996.

1 Q. All right. Okay. Now, I want to -- did you
2 get an immediate response from them?

3 A. I mean, the immediate response was, hey, this
4 looks interesting, I'll go talk to other people. I
5 didn't get any immediate official response, just that
6 Bernhard would continue to look --

7 Q. Okay.

8 A. -- into the matter.

9 Q. And can you tell me now, what -- after that
10 first meeting in '96, what was the next thing that
11 happened in terms of your effort to partner with SAP on
12 Pricer?

13 A. SAP had a sales conference in 1997, I believe,
14 the first one was in California, and I knew Bernhard
15 Neumann was going to come to that conference. So I
16 offered to meet him there and bring him up to date on
17 the latest work that we had done, both with the product
18 and, as I mentioned, we had integrated our product to
19 SAP, so I thought he might particularly find that
20 interesting, so I wanted to tell him more about what we
21 had done at that point.

22 Q. Okay. You met with Dr. Neumann? Did you show
23 him the product?

24 A. Yes, we did.

25 Q. Did he ask questions?

1 A. Yes.

2 Q. Was there anybody else there?

3 A. I believe at that meeting he brought with him a
4 person named Wilifred Merkel, who was the person
5 responsible for the pricing software at SAP. Bernhard
6 Neumann, his focus was elsewhere, even though he was
7 very senior, so he brought the person who was very
8 focussed on pricing.

9 Q. Were Dr. Neumann and Wilifred Merkel involved
10 in SAP's research and development in the area of
11 pricing?

12 A. Yes, they were.

13 Q. And the -- the first meeting you mentioned in
14 '97, was that in about April of '97?

15 A. Yes, that was April.

16 Q. And where was that?

17 A. I believe that was at Disneyland, actually.

18 Q. All right. Now, I want to fast forward a
19 little bit. What was the next thing that happened after
20 your April '97 meeting?

21 A. Well, SAP went from Disneyland to Disney World
22 and so there was another conference at Disney World in
23 Florida the next time and similar --

24 Q. When was that?

25 A. I believe that was August of '97. And I

1 believed that Bernhard Neumann would be at that
2 conference like he was the last one, so I reached out
3 and said, hey, can we meet again? Can I show you the
4 latest and keep trying to promote the partnership.

5 Q. Okay. And at the time did they continue to
6 seem interested?

7 A. Yes.

8 Q. All right. Now, and -- so this was April and
9 August of 1997, right?

10 A. Correct.

11 Q. All right. I want to show you, again --

12 MR. COLE: Mr. Diaz if we could bring up
13 PX1637.

14 Q. (By Mr. Cole) -- I want to show you, again, a
15 couple of internal SAP e-mails that you would not have
16 had access to at the time and ask you about that.

17 First, is -- this is just a cover e-mail
18 and I just want to establish that --

19 MR. COLE: If you could just zoom in to
20 show the date and the people.

21 Q. (By Mr. Cole) -- it's an e-mail from a guy
22 named John Zmolek at SAP in January of '97, that was
23 before those meetings?

24 A. Yes. Correct.

25 Q. All right. And who -- do you see a couple of

1 names there, Wilifred Merkel and Bernhard Neumann?

2 A. Yes, those are the two people I mentioned I met
3 with.

4 Q. Okay. And Peter Zencke, who is he?

5 A. Peter Zencke was the head of all of SAP's
6 research and development. He was the top of the top of
7 their engineering teams.

8 Q. Okay. And so in this January e-mail, they
9 attach a memo behind it?

10 MR. COLE: And if we can bring that up.
11 It's PX1638.

12 All right. And if we could blow up -- if
13 you could blow up this bottom paragraph here.

14 Q. (By Mr. Cole) And the topic of this at the top
15 says: Proposed guidelines for internal and external
16 communications on SAP's SFA strategy.

17 What's SFA?

18 A. SFA stands for sales force automation. It's
19 kind of the broad category of all the software that
20 would include pricing.

21 Q. Okay. And I want to focus your attention here
22 on the second bullet point. It says: For vendors we
23 are not planning to work with -- this is in January of
24 '97, and it gives some names, Calico, CWC, eventually,
25 Trilogy.

1 Now, let me ask you this. When you met
2 with Dr. Neumann and Wilifred Merkel in April and August
3 of '97 and showed them Pricer, did they tell you they
4 had already decided not to work with Trilogy?

5 A. Certainly not.

6 Q. Would you have met with them and showed them
7 your product if they had told you they'd already made up
8 their minds; they weren't going to work with you?

9 A. No, certainly not.

10 Q. Thank you, Mr. Carter.

11 MR. COLE: We'll pass the witness.

12 THE COURT: Cross-examination.

13 MR. MELSHEIMER: May it please the Court.

14 CROSS-EXAMINATION

15 BY MR. MELSHEIMER:

16 Q. Good morning, Mr. Carter.

17 A. Good morning.

18 Q. We just met out in the -- during the break,
19 didn't we?

20 A. Yes.

21 Q. All right. Let me see if there's some things
22 that you and I can agree on, all right, sir?

23 A. Okay.

24 Q. So, first of all, you told the jury in your
25 direct examination that your '350 patent was filed in

1 1996. Do you recall that?

2 A. Yes.

3 Q. Okay. Let's take a look at the patent itself,
4 which the jury has. And, of course, the filing date on
5 the patent itself, the '350 patent, the patent involved
6 in this case, is February 19th, 1999. That's what it
7 says, right?

8 A. Yes, that's correct.

9 Q. Now, let's just be clear about what happens
10 when a patent is filed, an application is filed. It's
11 not public when it's filed, is it, sir?

12 A. I don't believe so.

13 Q. In fact, when the patent application is filed,
14 there's lots of give and take between the Patent Office
15 and an inventor like yourself that takes place in
16 private; fair statement?

17 A. Yes, that's correct.

18 Q. And it's not like SAP or anyone could go to the
19 Patent Office in February of 1999 and say: Hey, give me
20 Mr. Carter's patent application. They couldn't do that,
21 right?

22 A. Not that I know of anyway.

23 Q. Right. And you're not suggesting that they did
24 do that, are you?

25 A. No.

1 Q. Okay. So -- and just so we're clear, so it's
2 filed not in '96, but in 1999. It's private up until
3 the time it issues; fair statement?

4 A. I believe so.

5 Q. Okay. And then let's look how long it took to
6 issue. April 22nd, 2003.

7 Now, you made a little joke about this,
8 that it took them a while to kind of get to -- you
9 weren't -- you weren't criticizing the Patent Office,
10 were you?

11 A. No.

12 Q. Okay. So -- but the point is, in this time
13 period, as far as you know, from 1999 to 2003, all the
14 materials describing your invention, your ideas, that's
15 secret, right?

16 A. I believe so.

17 Q. All right. It's kept within the Patent Office.
18 You know about it, and the Patent Office knows about it,
19 but the Patent Office doesn't publish this or disclose
20 this to the world until the patent actually issues in
21 2003. Do I have that about right?

22 A. Again, I'm not the lawyer, but I believe that
23 is correct.

24 Q. All right. Now -- so I want to talk to you a
25 little bit about this chart that I put up. You were

1 here for the opening. I think I look -- I think I
2 looked right at you in the opening.

3 A. Yes, sir.

4 Q. Yes, sir. Okay.

5 MR. MELSHEIMER: Can I have the ELMO,
6 please, ma'am?

7 COURTROOM DEPUTY: Yes, sir.

8 Q. (By Mr. Melsheimer) All right. Now, I just
9 want to make sure that you agree with the dates and the
10 relationships that I put up there. Are you with me?

11 A. Yes, I am.

12 Q. All right, sir. So there's no dispute that SAP
13 added this hierarchical access feature to its ERP
14 software. We've got a lot of abbreviations working
15 here, don't we?

16 A. Yeah.

17 Q. Okay. That we added that to our ERP software
18 in 1998, correct?

19 A. Correct.

20 Q. All right. And your '350 patent did not issue
21 until 2003, right?

22 A. That's correct.

23 Q. And you didn't -- the filing date that was
24 reflected on that patent that we just looked at that the
25 jury has in their books is actually right around in

1 here, 1999, fair?

2 A. Yes.

3 Q. All right. Now, we can agree, just as a basic
4 point, that from the period from 1998 to 2003, whatever
5 was going on in the world during that time period, there
6 was no infringement of the '350 patent; fair statement?

7 A. I believe so.

8 Q. Okay.

9 MR. MELSHEIMER: Your Honor, I would offer
10 this as --

11 Q. (By Mr. Melsheimer) Well, let me -- let me ask
12 you one more thing. Sorry.

13 2007. Now, you -- you left Trilogy in
14 2006, right?

15 A. Yes, that's correct.

16 Q. Now, when you left, was it still called
17 Trilogy?

18 A. Yes.

19 Q. Okay. When did they change their name to
20 Versata?

21 A. I honestly don't know.

22 Q. You don't know. Okay. Well, fair enough.

23 Well, so you left in 2006, and this
24 lawsuit didn't get filed until 2007, fair, as far as you
25 know?

1 A. As far as I know, yes.

2 Q. All right. And you also -- you don't have any
3 personal knowledge, do you, that anyone from Trilogy or
4 Versata told anyone at SAP about the '350 patent before
5 2007?

6 A. No, I have no personal knowledge of that.

7 Q. And just to go back to something you were
8 talking about with Mr. Cole a little bit earlier -- and
9 we'll talk about this more maybe before lunch, maybe --
10 maybe after lunch, but you were talking about these
11 communications that you were having with SAP about
12 having a partnership, right?

13 A. Yes.

14 Q. A couple things about that.

15 So you actually had those kinds of
16 communications with a whole bunch of different
17 companies, fair?

18 A. Yes.

19 Q. Oracle, right?

20 A. Yes.

21 Q. Microsoft?

22 A. Yes.

23 Q. Okay. Didn't develop a partnership with
24 Oracle, did you?

25 A. Not with the pricing product.

1 Q. Didn't develop a pricing partnership with
2 Microsoft either.

3 A. No. That's correct.

4 Q. Now, with respect to your meetings with SAP,
5 those meetings actually took place over a period of
6 years, fair?

7 A. Yes.

8 Q. And it's fair, isn't it, sir, that your lawyer
9 showed you some documents that you were not aware of
10 that -- internal SAP documents that you said you were
11 not aware of, right?

12 A. Correct.

13 Q. Well, now, there's some things, though, that
14 you didn't tell SAP during these conversations either;
15 isn't that fair?

16 A. I'm sure it is.

17 Q. Right. Well, one thing you know you didn't
18 tell them is, you never told them during any of these
19 conversations in '97, '98, '99 -- when did they end, by
20 the way? I just want to get it right.

21 A. The conversations about partnership?

22 Q. Yes, sir.

23 A. Specific to the pricing product, I think it
24 ended about 1998.

25 Q. '98 or so?

1 A. About that, yes.

2 Q. Okay. I'm not fussing with you about the date,
3 sir --

4 A. Yeah.

5 Q. -- but the point is, you never told them that
6 you were thinking about filing any sort of patent, did
7 you, the '350 patent?

8 Let me rephrase that.

9 A. The '350 patent, no. We had other patents
10 that --

11 Q. Right. You never told them that you had a
12 patent application for the '350, fair?

13 A. Not that I remember. I don't think so.

14 Q. And I'm not complaining about that or fussing
15 at you about that at all, but I just want to make it
16 clear, you were having conversations with them, and
17 there were some things you didn't tell them, right?

18 A. Yes.

19 Q. And that's because in part, you were running a
20 business, right?

21 A. Yes.

22 Q. They were running a business?

23 A. Yes.

24 Q. You thought you might be able to have some
25 business that you might be able to do together, right?

1 A. Yes.

2 Q. But you were also competing to some extent with
3 them, right?

4 A. That's correct.

5 Q. And you don't fuss at SAP for trying to run
6 their business in a way that -- that tries to get as
7 many sales as they can get, fair?

8 A. That's fair.

9 Q. That's what you were trying to do, right?

10 A. Yes.

11 Q. Right. You were trying to run your business to
12 get as many sales as you probably could ethically and
13 appropriately, fair?

14 A. Yes.

15 Q. And if you could do that -- if not telling SAP
16 something would help you do that, you'd sure do it,
17 right?

18 A. Yes. As you said, given all things being
19 ethically done, et cetera, yes.

20 Q. Okay. So -- and you're not saying that --
21 that -- in fact, one of these -- one of these meetings
22 that you had with SAP in the early time period -- maybe
23 we'll get to this a little bit later. I don't want to
24 dwell on this too much.

25 But you had a meeting with them where you

1 had originally went into the meeting with an idea that
2 you were going to tell them a whole lot about your
3 product, right?

4 A. Yeah. You're referring to that configuration
5 meeting?

6 Q. Yeah. The configuration meeting, right?

7 A. Correct.

8 Q. Well, that's a good point. Thanks for bringing
9 that up. Because, in fact, the meetings you were having
10 with SAP were not just about Pricer, right?

11 A. There were other meetings. The ones that I had
12 with Bernhard were specific to pricing.

13 Q. I'm sorry. Let me make sure I got the question
14 right.

15 You had meetings with SAP regarding your
16 configuration product, right?

17 A. Yes, that's correct.

18 Q. Now, let's just make sure we understand what
19 that is. What is a configuration product? What does
20 that mean?

21 A. Configuration software, or a product, allows a
22 customer to, you know, tell a sales rep what they want
23 at a high level, and it will come -- the configuration
24 software comes up with all the parts.

25 So imagine buying a computer and saying:

1 I want a computer that will do basic surfing of the web,
2 and that software comes back and tells you what CPU,
3 what memory and disk you need. So it takes your
4 requirements as a customer and comes up with the parts
5 to sell you.

6 Q. Right. So that's -- that's pretty cool, isn't
7 it?

8 A. We thought so.

9 Q. You thought -- well, oh. I'm not -- you can
10 brag away, if you want to. It was -- it was a cool
11 product, wasn't it?

12 A. Yes.

13 Q. Now, it's not SC Pricer that we're talking
14 about in this case, right?

15 A. That is correct.

16 Q. It's a different product.

17 A. Yes, that's correct.

18 Q. In fact, I think I saw in one of those USA
19 Today articles that your lawyer put up -- maybe there
20 was a -- it was a way for like a shoe company to make
21 sure they had the right kind of -- the right -- right
22 number of ladies' shoes and the right styles of shoes
23 and the different heel lengths and all that stuff. Have
24 I got that about right?

25 A. Yes.

1 Q. Okay. So that was a product you were talking
2 about with SAP about possibly partnering with them,
3 correct?

4 A. Yes.

5 Q. And when you went into a meeting with them at
6 one point in the late '90s, mid-'90s, you actually
7 decided in the middle of the meeting -- you and
8 Mr. Liemandt stepped out of the meeting and decided that
9 you weren't going to tell SAP some things about your
10 product at that meeting.

11 Remember that?

12 A. Yes, I remember that.

13 Q. Okay. You had gone to the meeting with the
14 idea that: Hey, we're going to be open and tell them a
15 bunch of details, but then you decided in the middle:
16 You know what? We're going to play our cards a little
17 closer to the vest, right?

18 A. That was decided.

19 Q. Right.

20 A. Characterizing that I was the one that decided
21 that may not be quite right.

22 Q. Fair enough. And -- Mr. Liemandt decided that?

23 A. Someone else did.

24 Q. He was the big boss, right?

25 A. Yes.

1 Q. He was the founder of the company?

2 A. Yes.

3 Q. And he went into this meeting with -- and
4 certainly, SAP, at that meeting, it was your
5 understanding they expected to get some information
6 about the configuration software, right?

7 A. I mean, I can't say what they expected. I
8 don't -- again, I don't know what's in their head, but
9 that was the original plan.

10 Q. That was the original plan, and in the middle
11 of the meeting, you took a break, and Mr. Liemandt said:
12 Let's not tell them all this stuff (whispering), right?

13 A. Effectively, yes.

14 Q. All right. Now, you didn't think there was
15 anything wrong with that, did you?

16 A. No. I mean, it was just a decision.

17 Q. It was business, right?

18 A. It was business.

19 Q. It was a business meeting between two companies
20 that might have some business to do together but might
21 decide not to do business together; fair statement?

22 A. Yes, that's a fair statement.

23 Q. And you certainly didn't go in and tell
24 Trilogy -- or just tell SAP, after you came back from
25 that break: Now, guys, we've had a little private

1 meeting out here, and we've decided not to tell you some
2 things that we intended to originally tell you.

3 You didn't tell them that, right?

4 A. Actually, I think we did almost say that, but
5 it was kind of apologetic. I'm sorry. We're not going
6 to do this.

7 Q. Oh, so you told them you were sorry that you
8 weren't going to reveal as much as maybe they expected,
9 fair?

10 A. That's fair.

11 Q. Okay. But these meetings took place over a
12 period of years. There were some ups; there were some
13 downs. And ultimately, there was no agreement reached
14 to partner with SAP; fair statement?

15 A. Correct.

16 Q. Now, again, you had similar meetings with other
17 companies, like Microsoft and Oracle, and those
18 discussions didn't result in any partnership either,
19 fair?

20 A. Yes.

21 Q. Now, there were some disagreements within the
22 company, within your company, Trilogy, about whether or
23 not that was even a good idea, right, to have that kind
24 of partnership?

25 A. Yes.

1 Q. I mean, some people thought: You know what?
2 Let's not do that. Let's be our own independent
3 company, and let's not worry about SAP, fair?

4 A. Yes, that's fair.

5 Q. Some people said: You know what? Maybe we
6 should partner with them. Maybe we can do some things
7 together. Maybe we can develop some products together.
8 Maybe they can sell our product or resell our product.
9 Some people had that view, right?

10 A. Yes.

11 Q. And at the end of the day, the partnership
12 never materialized, fair?

13 A. Yes.

14 Q. All right. Now, I want to talk a little bit
15 about a couple of other things I think we can agree on,
16 sir. Let me go back to this.

17 MR. MELSHEIMER: Can I have the ELMO back?

18 Q. (By Mr. Melsheimer) All right. So I've got a
19 miniature version of the chart that Mr. Cole put up
20 there, all right?

21 If it was someone's investment portfolio,
22 it wouldn't look too good, right?

23 A. Correct.

24 Q. Right. Okay. So let's take a look at it here.
25 And, in fact, if we start to move it over here a little

1 bit, right -- so this line is 1998, right? This red
2 line that you talked about, that's 1998.

3 And, again, just -- it's kind of hard to
4 see because I haven't done it right, but -- 1998, that's
5 the red line, and then you've got this big dropping off
6 the cliff, right?

7 A. Correct.

8 Q. And that's a visual representation of it.

9 A. Correct.

10 Q. And just so we're on the same page, you
11 understand that Trilogy's position in this case is that
12 because SAP added this one feature in 1998, that Trilogy
13 was headed up through the moon or headed up or
14 continuing at the same pace, and because SAP did that --
15 again, I'm just asking you if you understand the
16 position here -- because SAP did that in 1998, that this
17 is what caused this big collapse.

18 Is that your understanding of what's going
19 on here?

20 A. Yes, that's correct.

21 Q. All right. Now, again, just so we're clear, in
22 1998, when SAP added that feature, you didn't own it in
23 the '350 patent, fair?

24 A. Yes.

25 Q. Another point about this that was suggested,

1 just so there's no uncertainty here, you're not telling
2 the jury or anyone, because it would be totally wrong,
3 to suggest that SAP got Trilogy's source code and took
4 it and put it in its product. You're not saying that,
5 are you?

6 A. No. I don't believe they had access to the
7 source code.

8 Q. Okay. Well -- and you -- so -- and before,
9 you've, in fact, testified that you do not believe that
10 SAP ever had any access to the secret source code in
11 part because you were the one in charge of it, right?

12 A. Yeah. No. They -- they asked for it, and we
13 didn't give it to them.

14 Q. Right. And -- well, that's a good point, too.
15 They asked for some source code. You wouldn't give it
16 to them. You asked SAP for some stuff, and they
17 wouldn't give it to you either, right?

18 A. Correct.

19 Q. All right. So when you said we didn't give it
20 to them, you weren't suggesting that they were trying to
21 steal your source code, were you?

22 A. Again, I don't know what they were intending.

23 Q. Okay. But when you asked them -- let's put it
24 back another way, sir.

25 When you asked them for their source code,

1 for their interface code, you weren't trying to steal
2 that from them, were you?

3 A. No, I was not.

4 Q. Okay. And you don't think anyone at Trilogy
5 was trying to steal anything doing that, right?

6 A. No, I do not.

7 Q. Okay. So just so -- again, just so we're
8 perfectly clear, there's no suggestion that there is
9 software code that belongs to Trilogy that has shown up
10 in SAP's software in 1998, correct?

11 A. Yes. I believe there's no code of ours that
12 showed up in theirs.

13 Q. And again, we know -- one thing we know
14 about -- so in addition to knowing that there's no
15 patent in 1998, we know that there's no stolen or taken
16 or ripped off software code in 1998, right?

17 A. There's no software or --

18 Q. No taken -- no software code taken from you at
19 Trilogy --

20 A. Correct. Correct.

21 Q. -- and put into SAP, right?

22 A. Correct. I don't believe any actual code was
23 taken.

24 Q. And indeed, the patent -- now, in fact --
25 again, just so we're orienting ourselves, you didn't

1 even file your patent until 1999, which is right
2 about -- sort of -- actually on the right side of the
3 red line is when you filed your patent, right?

4 A. That's correct.

5 Q. Okay. All right. So I want to talk to you --
6 so before we -- so here's what I want to do. I want to
7 talk about a lot of things that were happening at
8 Trilogy from 1998 to about 2003.

9 Are you with me?

10 A. Yes.

11 Q. Okay. Now, before we do that, I want to ask
12 you just a couple of big picture questions.

13 There's a note that I'm talking too fast.
14 I don't know if it just showed up or -- I'll slow down.
15 I'm sorry.

16 A. They tell me the same thing.

17 Q. So you get these notes sometimes, and you don't
18 know if they're old or -- all right.

19 MR. COLE: That one was mine. So sorry.
20 You're falsely accused.

21 MR. MELSHEIMER: Okay. Well, you were
22 talking too fast.

23 Q. (By Mr. Melsheimer) Couple of big concepts,
24 Mr. -- Mr. Carter.

25 You agree that it's important for

1 companies, just like people, to take responsibility for
2 their actions, fair?

3 A. That's fair.

4 Q. If you make mistakes, if you make the wrong
5 decision, maybe in totally good faith -- you may have
6 thought you were making the right decision, but if you
7 make the wrong decision, you should have to accept the
8 consequences, right?

9 A. Yes.

10 Q. And in business, you had a lot of decisions to
11 make at Trilogy, right?

12 A. Yes.

13 Q. And you don't think that you made all the right
14 decisions, do you?

15 A. No.

16 Q. Because you'd be the first witness I'd ever
17 seen that said they made all the right decisions. You,
18 in fact -- and no criticism of you at all, sir, but you,
19 in fact -- you and the company made some bad decisions
20 or wrong decisions during the course of your time at
21 Trilogy, fair?

22 A. Yes, that's fair.

23 Q. All right. And it's also fair, isn't it, sir,
24 that when we're talking about what's going on in a
25 marketplace, why customers are buying, why they're not

1 buying, that there are many, many facts and
2 circumstances that determine what's happening, correct?

3 A. Yes, that's correct.

4 Q. And I think you've told us before that it's
5 pretty hard to ever pinpoint one thing in a marketplace
6 when you have a lot going on, fair?

7 A. Yes. It's -- it's difficult.

8 Q. All right. So with that in mind, sir, I want
9 to talk about 1998.

10 Now, the CEO of Trilogy, in 1998, was this
11 fellow Mr. Liemandt, right?

12 A. Yes.

13 Q. Smart guy, right?

14 A. Absolutely.

15 Q. Founder of the company?

16 A. Yes.

17 Q. Still alive and well?

18 A. Yes.

19 Q. Living here in Texas?

20 A. Yes.

21 Q. Okay. Now, in 1998, Mr. Liemandt concluded
22 that at least to some respects, Pricer had failed to
23 deliver. Remember that?

24 A. Yes, I do.

25 Q. All right. Let's take a look at Defendants'

1 Exhibit 824.

2 Now, sir --

3 MR. MELSHEIMER: Just one moment, Your
4 Honor. May I?

5 (Pause.)

6 Q. (By Mr. Melsheimer) All right, sir. So this is
7 a meeting -- the minutes of a board meeting in April of
8 '98, right?

9 A. Yes.

10 Q. Now, this is actually five or six months before
11 SAP introduces this hierarchy access feature among
12 thousands of features in the software, right?

13 A. Yes, that's correct.

14 Q. And what he concludes is -- now, this is --
15 this is an e-mail from Mr. Liemandt to a bunch of people
16 at Trilogy, right, including you?

17 A. Yes.

18 Q. And he's asking if he should send this to the
19 company; do you have any comments, right?

20 A. Correct.

21 Q. And he says: With respect to SC -- now, that's
22 Pricer, right?

23 A. Pricer is --

24 Q. Selling chain.

25 A. Pricer is a part of it.

1 Q. Part of --

2 A. Pricer is not the whole thing.

3 Q. Right. Part of -- right. Yes. SC Pricer,
4 selling chain -- Pricer is part of selling chain?

5 A. It is part of it.

6 Q. All right.

7 A. There are other products, like SC Commission
8 and Config. That are a part of it.

9 Q. Let me ask you something else -- and I hate to
10 jump around, but at the very end of your examination
11 with Mr. Cole, you were shown an e-mail about some
12 bundling, this idea that SAP would bundle some software
13 products together in one product.

14 Do you remember that?

15 A. Yes.

16 Q. Y'all do that.

17 A. We -- yes. Trilogy also would bundle products.

18 Q. Yeah. Nothing wrong with that, right?

19 A. No. Bundling by itself, there's nothing wrong.

20 Q. Okay. Because sometimes what you decide to do
21 as a business is, you decide to put a bunch of products
22 together to offer to the customer, right?

23 A. Yes, that's correct.

24 Q. And you might have all kinds of reasons for
25 doing that, true?

1 A. Yes.

2 Q. And sometimes it's because you want them to,
3 what, really like a certain add-on or something of that
4 nature, right?

5 A. Yes, that's correct.

6 Q. And maybe -- and you may or may not charge an
7 additional price for it, right?

8 A. Yes, that's correct.

9 Q. And if you don't charge an additional price for
10 it, there's nothing wrong with that, is there?

11 A. No. There's nothing wrong with that.

12 Q. Okay. So at this meeting -- let's go back.

13 April '98. SC missed bookings by 50
14 percent. Now, this is looking at the earlier period of
15 the year, right? This is a quarterly review.

16 A. Yes, that's correct.

17 Q. So we're looking at the first four months of
18 1998, right?

19 A. Yes, that's correct.

20 Q. It says: Missed bookings by 50 percent. Bet
21 big on Pricer and failed to deliver, right?

22 A. That is correct.

23 Q. And he concludes or he states that Pricer was a
24 poor value proposition into SAP accounts. Do you see
25 that?

1 A. Yes, I do.

2 Q. Now, I've read a lot of these e-mails, and you
3 guys at Trilogy and businesses everywhere use business
4 speak, don't you?

5 A. Perhaps, yes.

6 Q. Perhaps?

7 A. Give me an example, yeah.

8 Q. Value proposition.

9 A. Yes.

10 Q. That means -- when you say something is a poor
11 value proposition, you mean its benefits were not as
12 great as the costs, right?

13 A. To -- to the specific person evaluating that,
14 correct.

15 Q. Right.

16 A. Different people perceive value differently.

17 Q. Right. And so SAP accounts, that is to say big
18 companies or small companies, that run SAP software
19 didn't think that Pricer was a good value for them.
20 That's what Mr. Liemandt is saying in this e-mail, fair?

21 A. He was at least saying the people that we were
22 talking to then did not value it.

23 Q. He says: Too maintenance technical. And
24 that's sort of a shorthand, I guess, because it's not
25 really a sentence. Too maintenance technical. Not

1 enough business benefits, right?

2 A. Correct.

3 Q. Mr. Liemandt, again, a guy that was pretty
4 plugged in to what was going on in the business, wasn't
5 he?

6 A. Yes.

7 Q. He wasn't one of these CEOs that's not involved
8 in the business or goes off on long vacations; he was
9 there every day working hard, immersing himself in the
10 facts, right?

11 A. Yes, that's true.

12 Q. And in that context, he was able to conclude
13 that -- that Pricer was a poor value proposition for SAP
14 people and that it didn't have enough business benefits
15 at least as of April 1998, right?

16 A. Yes. That's what he was saying there.

17 Q. Just so we're clear on this, Pricer had been
18 around for several years in 1998, right?

19 A. Yes.

20 Q. First sale of it was in about '95 or '96; is
21 that right?

22 A. Late '95, yes.

23 Q. So three years into it, he's concluded that, at
24 least with respect to SAP, for this period of time,
25 didn't have the business benefits, fair?

1 A. To the people that we were selling, yes.

2 Q. Let's talk about that.

3 The people that you were selling to were
4 the businesses that you targeted that you thought might
5 need pricing software, fair?

6 A. Yes. I was implying the different people
7 within the business, but yes.

8 Q. Sure. And so you decided, when you went out
9 and met with people, you decided which customers to call
10 on, big or small, right?

11 A. Not always.

12 Q. Okay. Let me ask another question.

13 When you first started selling Pricer, you
14 viewed the landscape as pretty open as to people you
15 could sell to, right?

16 A. Yes.

17 Q. You could sell to people who were running SAP,
18 right?

19 A. Yes.

20 Q. You could sell to people who were running
21 Oracle?

22 A. Yes.

23 Q. You could sell to people who were running other
24 ERP software?

25 A. Yes, that's correct.

1 Q. Okay. Let's talk a little bit about ERP
2 software so we don't have to keep -- keep doing this.

3 Enterprise resource planning is a major
4 comprehensive piece of software that a business or an
5 organization could use to run all -- all aspects of
6 their business. Is that a fair way of putting it?

7 A. That's a fair way to put it, yes.

8 Q. And it's much, much more than pricing, fair?

9 A. Yes.

10 Q. I'm not trying to --

11 A. Oh, absolutely.

12 Q. I'm not trying to diminish what you did, but
13 there's thousands and thousands of features in an ERP
14 program that never touch pricing, right?

15 A. Yes.

16 Q. That's true whether it's SAP selling that or
17 that's true whether it's Oracle selling that kind of
18 software, right?

19 A. Correct.

20 Q. And your product was a pretty narrow part of --
21 in the scheme of ERP world, was a pretty narrow part of
22 the business. I know you think it's important, but
23 pretty narrow in terms of the scope of the software
24 completely; is that a fair amount?

25 A. Yeah. In the scope of the -- the whole domain

1 of ERP software, pricing is just one piece of that.

2 Q. Because ERP software can do scheduling, right?

3 A. Correct.

4 Q. Can do ordering of materials, right?

5 A. Yes.

6 Q. It can do shipping and other logistics, right?

7 A. Yes.

8 Q. It can do financial reporting?

9 A. Correct.

10 Q. It can maintain HR records?

11 A. Yes.

12 Q. And none of those things, as I've listed them,
13 typically would involve pricing, fair?

14 A. Yeah, that's -- that's fair. I think sometimes
15 they might touch it, but for the most part, yes, I
16 understand your point.

17 Q. You understand, too, sir, and we can agree,
18 that SAP had pricing in its ERP software for many, many
19 years, right?

20 A. Absolutely.

21 Q. You're not suggesting to the jury that before
22 Trilogy came along, SAP had no pricing capability at
23 all, right?

24 A. No.

25 Q. Now, you thought yours was better, fair?

1 A. Yes.

2 Q. Right?

3 But SAP had a lot of different ways of
4 doing pricing even before Trilogy came on the scene,
5 fair?

6 A. Yes.

7 Q. 1998, I want to stay there.

8 Now, by the end of 1998 -- so we're in
9 April. We start out in April.

10 MR. MELSHEIMER: Can I get the ELMO?

11 COURTROOM DEPUTY: Yes, sir.

12 MR. MELSHEIMER: I'm sorry.

13 COURTROOM DEPUTY: No.

14 Q. (By Mr. Melsheimer) In April of 1998, we've got
15 that Liemandt e-mail, but let's go to the end of 1998.

16 By the end of 1998, Trilogy had lost a
17 number of accounts at SAP, customers. Does that square
18 with your recollection?

19 A. Yes.

20 Q. And, again, when we say SAP customers, we mean
21 these businesses like UPS or Westlake Chemical or
22 Eastman -- or these businesses that run SAP software,
23 right?

24 A. Correct.

25 Q. Okay. You had lost a number of accounts by the

1 end of 1998, right?

2 A. Yeah. And when you say lost accounts, not that
3 they've been with us and left; you mean we didn't get
4 the sale.

5 Q. That's a fair -- that's a fair statement, sir.
6 Yes, you didn't get the sale.

7 A. Correct.

8 Q. Let's look at DX806.

9 So this is an e-mail at the end of the
10 year from a man named Mr. Snyder to some people
11 associated with the Pricer product, right?

12 A. Correct.

13 Q. And it says: Deals affected by SAP integration
14 in the first half of 1999. And what he's talking about
15 here is that because of S -- because of Trilogy's
16 inability to integrate its software to work with SAP,
17 there had been some accounts lost, and here's potential
18 accounts lost, and here's the list of them here.
19 Lennox, Eastman are two examples I see right there,
20 right?

21 A. Yes, but just to be clear, you characterized
22 that we were unable to integrate. We actually had done
23 integrations with them, with other customers at that
24 point.

25 Q. But you ended up -- like, for example, for

1 Lennox, lost the Pricer portion of the deal due to
2 integration, right?

3 A. And it says: Due to integration deficiencies.
4 It wasn't that it didn't work at all; it wasn't that we
5 hadn't done it; it just -- it wasn't to their liking the
6 way it had been done or the status of it at that point.

7 Q. Well, let's be fair about that. If the
8 customer doesn't like it, it's a big problem.

9 A. Oh, absolutely.

10 Q. Okay. And then with Eastman Chemical, they had
11 brought -- they had been involved in Pricer promotion
12 channel. Overall added value did not outweigh
13 integration costs and concerns.

14 That's that -- that's that same thing
15 Mr. Liemandt was saying earlier about the business
16 benefits did not outweigh the costs, right?

17 A. That's correct.

18 Q. Now, you -- and I said this in my opening,
19 sir -- you actually took some responsibility for some of
20 these issues associated with the SAP integration, didn't
21 you?

22 A. Yes, I did.

23 Q. And we don't need to go over that e-mail, but
24 you said that you just didn't do enough.

25 A. Yes, that's correct.

1 Q. Now, you didn't say -- because I listened to
2 your direct examination, and you -- you didn't -- let's
3 go to that e-mail. Let's go to DX885.

4 You didn't say in this e-mail what I
5 thought I heard you say to the jury. Are you with me?

6 A. Okay.

7 Q. You didn't say in this e-mail that SAP had done
8 anything wrong to put you in this position.

9 A. No.

10 Q. All right. You say that, for example: I've
11 personally been involved in several SAP installations
12 and did the minimum necessary and that everyone with
13 contact with an SAP account has failed to learn even the
14 basics of SAP, right?

15 A. Yes. That's what I said.

16 Q. So you said -- a minute ago in your direct, you
17 said: Well, SAP didn't make it easy on us. Do you
18 remember that?

19 A. Yes, I did.

20 Q. Okay. Well, you didn't make it very easy on
21 yourself either to be fair, right?

22 A. I certainly could have done more, as I said.

23 Q. Well -- and I'm not -- I appreciate you saying
24 this, and I know it's -- it's -- it's got to be a
25 strange world to be sitting here looking at an e-mail

1 that you wrote 10 years ago. I get that, okay?

2 But the point is, you said -- not that
3 SAP's making it difficult but that the folks at Trilogy
4 had failed to even learn the basics of SAP, right? I
5 mean, that's what it says.

6 A. Yes, that is definitely what it says.

7 Q. SAP is complicated software, right?

8 A. Yes.

9 Q. You have to understand how it works to have a
10 product that works with it, right?

11 A. Yes.

12 Q. You can't just plug it in like you do something
13 in the wall and say there it goes, right?

14 A. That is correct.

15 Q. You've got to spend a lot of time and work and
16 effort figuring out all the different interrelationships
17 if you're going to add a product to another product like
18 SAP's or like Oracle's, fair?

19 A. Yes, that's fair.

20 Q. Now, part of the problem in making it better --
21 and you told us in this e-mail and you said just a
22 minute ago that you were -- you wanted to make it
23 better, right?

24 A. Yes, that's correct.

25 Q. But it wasn't just you, was it, that was

1 involved in this, fair?

2 A. Yes, that's fair.

3 Q. The other problem you had --

4 MR. MELSHEIMER: And let's go to the next
5 page.

6 Q. (By Mr. Melsheimer) The other problem that you
7 had -- and this -- this is an e-mail from Mr. Royo.

8 A. That one appears to still be mine back to him.

9 Q. Okay. But -- I'm sorry. To -- thank you.
10 This is an e-mail from you to Jose Royo. Who is Jose
11 Royo?

12 A. I believe he was one of our developers at the
13 time.

14 Q. And you say: I have to address one of your
15 comments, Jose. Nothing personal, but -- now that's
16 generally when you see that, something's bad coming,
17 right?

18 A. Yes.

19 Q. Okay. So one of the things you say here is you
20 say that the number of people in development who have
21 even a base working knowledge of SAP's functionality can
22 be measured on one hand.

23 Now, my math says that's five or less,
24 right?

25 A. That is correct.

1 Q. And you say -- earlier you say: Trilogy's SAP
2 represents the single biggest competitive threat to
3 Trilogy's vision of being the next great software
4 company, and as a whole, we know next to nothing about
5 them.

6 You said that.

7 A. Yes, that's what I said.

8 Q. Now, let's talk about that. Now, you didn't
9 share this e-mail with SAP back in 1998, did you?

10 A. No, I didn't.

11 Q. You didn't tell -- when you were -- when you
12 were talking to -- to your contacts at -- at SAP -- who
13 were they again? Mr. Neumann, Dr. Neumann?

14 A. Bernhard Neumann was my main contact.

15 Q. You didn't tell Dr. Neumann that you were
16 having private conversations within Trilogy where you
17 were describing SAP as a big threat.

18 A. That is correct.

19 Q. And there's nothing wrong with that.

20 A. Yeah.

21 Q. Okay. Because that -- you were running your
22 business --

23 A. Yes.

24 Q. -- correct?

25 A. Yes, correct.

1 Q. And you were trying to compete fairly and as
2 fully as you could with SAP, right?

3 A. Yes.

4 Q. Even though at the same time, you were kind of
5 thinking about having a partnership with them.

6 A. Yes.

7 Q. Okay. So -- now, I want to skip --

8 MR. MELSHEIMER: Your Honor, are we going
9 to go a few more minutes or --

10 THE COURT: Well, actually, I was getting
11 ready to break for the lunch recess.

12 MR. MELSHEIMER: I'm not quite finished,
13 as you might have gathered, so if you would like to
14 break, this would be a great time to break.

15 THE COURT: I've got another matter I need
16 to take up at noon, so I'm going to go ahead and break.

17 Ladies and Gentlemen, what I'm not sure
18 about is how long that other matter is going to take me
19 over the lunch hour. So take until 1:30, take an hour
20 and a half for lunch. I'm going to start it as quickly
21 as I can, but be back ready to come in the courtroom at
22 1:30. Have a nice lunch, and don't talk about the case.

23 Y'all are excused.

24 LAW CLERK: All rise for the jury.

25 (Jury out.)

1 THE COURT: All right. If y'all don't
2 mind, you might want to remove your papers from counsel
3 table. I've got an injunction matter I want to hear at
4 noon or as quickly as I can. Y'all are in recess until
5 1:30.

6 MR. MELSHEIMER: Thank you, Your Honor.

7 LAW CLERK: All rise.

8 (Lunch recess.)
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CERTIFICATION

I HEREBY CERTIFY that the foregoing is a true and correct transcript from the stenographic notes of the proceedings in the above-entitled matter to the best of my ability.

/s/_____
SHELLY HOLMES, CSR
Deputy Official Court Reporter
State of Texas No. 7804
Expiration Date: 12/31/12

May 9, 2011

/s/_____
GLENDA FULLER, CSR
Deputy Official Court Reporter
State of Texas No. 1042
Expiration Date: 12/31/12

May 9, 2011